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October 1, 2009

Via Email & Hand Delivery

Hon. Shira A. Scheindlin  
United States District Judge  
U.S. District Court, Southern District of New York  
500 Pearl Street  
New York, New York 10007

Re: *City of New York v. Amerada Hess, et al.*, 04 CV 3417 (SDNY)  
*In re MTBE Products Liability Litigation*, MDL 1358

Dear Judge Scheindlin:

Following Dr. Montgomery's testimony today, ExxonMobil rested its case. *See* Exhibit A at p. 6403 ("The defense rests"). With the possible exception of Sunoco and Chevron, ExxonMobil presented no testimony or documentary evidence concerning the relative fault of any other Settling Defendants during the trial. Accordingly, the City requests that (1) Question No. 14 of Interrogatory Sheet for Phase III be limited to Sunoco and Chevron and (2) that ExxonMobil be prohibited from arguing that part of the fault for the City's injury is attributable to any of the Settling Defendants other than Sunoco and Chevron.

New York General Obligations Law Section 15-108 reduces the claim of a "releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest." The latest version of jury charge II(D)(4)(a) which implements the requirements of Section 15-108, states that "ExxonMobil has the burden of showing, by a fair preponderance of the credible evidence, that others are at fault and to what degree." It is not enough for ExxonMobil to merely state what it thinks its relative fault would be based on market share. To satisfy the requirements of Section 15-108 as set forth in jury charge II(D)(4)(a), proof of the *degree* of fault of the Settling Defendants is required.

During Dr. Montgomery's testimony, certain charts were displayed to the jury as demonstratives which purported to set forth the relative retail market participation of certain of the Settling Defendants. However, Dr. Montgomery did not testify concerning the specifics of those charts and those charts were never moved into evidence. While Dr. Montgomery did fleetingly refer to the relative retail market participation of Sunoco and Chevron, *see* Exhibit A at

pp. 6352 – 6353 (stating that Sunoco's market share was 12.1 percent); *id.* at pp. 6350 (agreeing that for some years Chevron had around a 3 percent market share), he did not testify about the relative market share of any of the other Settling Defendants, *see id.*

For the foregoing reasons, the City respectfully requests that Question No. 14 of Interrogatory Sheet for Phase III be limited to Sunoco and Chevron and that ExxonMobil be prohibited from arguing that part of the fault for the City's injury is attributable to any of the Settling Defendants other than Sunoco and Chevron.

Respectfully submitted,

A handwritten signature in dark ink, consisting of a stylized 'R' followed by a long horizontal stroke that tapers off to the right.

Robert S. Chapman

# EXHIBIT A

(Excerpted to Include Entirety  
of Montgomery's Testimony  
and Page 6403)

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1 UNITED STATES DISTRICT COURT  
 1 SOUTHERN DISTRICT OF NEW YORK

2 -----X

2 THE CITY OF NEW YORK, et al,

3 Plaintiffs,

4 -v-

04 CV 3417

5 EXXON MOBIL CORPORATION, et al,  
 6 Defendants.

6 -----X

New York, N.Y.  
 October 1, 2009  
 10:11 a.m.

9 Before:

10 HON. SHIRA A. SCHEINDLIN,

11 District Judge

12 APPEARANCES

13 MICHAEL A. CARDOZO  
 13 Corporation Counsel of the City of New York  
 14 Attorneys for City Plaintiffs  
 14 BY SUSAN E. AMRON

15 SHER LEFF LLP  
 16 BY: VICTOR M. SHER  
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17 GREENBERG GLUSKER  
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 20 Attorneys for Defendant Exxon Mobil  
 20 BY: PETER JOHN SACRIPANTI  
 21 JAMES PARDO  
 21 WILLIAM STACK  
 22 JENNIFER KALNINS TEMPLE  
 22 ANTHONY BONGIORNO

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1 (Trial resumed; jury not present)  
 2 THE COURT: Good morning, everyone.  
 3 ALL COUNSEL: Good morning, your Honor.  
 4 THE COURT: Could the witness come up.  
 5 DAVID HAND,  
 6 Resumed, and testified further as follows:  
 7 (Jury present)  
 8 THE COURT: Everyone, please be seated.  
 9 Good morning.  
 10 CROSS-EXAMINATION (Resumed)  
 11 BY MR. SHER:  
 12 Q. Good morning.

9aldcit3 Bell - cross

1 A. Yes, that's correct. Again, we've gone from parallel to  
2 series. Costs have increased substantially since that time.

3 MR. STACK: No further questions, your Honor.

4 THE COURT: All right. Anything further, Mr. Sher?

5 MR. SHER: Just very quickly, your Honor.

6 REDIRECT EXAMINATION

7 BY MR. SHER:

8 Q. The reference to \$30 million just for GAC that counsel just  
9 asked you about, Ms. Bell, you couldn't bill, in your opinion,  
10 a facility that would remove MTBE for \$30 million, could you?

11 MR. STACK: Objection, your Honor. Leading.

12 THE COURT: No, I will allow that. Go ahead.

13 A. Yes, that's correct.

14 MR. SHER: Thank you.

15 No further questions.

16 THE COURT: OK. We are done with Ms. Bell?

17 MR. STACK: I believe we are, your Honor.

18 MR. SHER: Yes. Thank you.

19 THE COURT: Thank you very much. OK.

20 MR. STACK: Any questions from the jury?

21 THE COURT: I don't know.

22 Do you want another chance to ask Ms. Bell any

23 questions?

24 (Pause)

25 JUROR NO. 1: No.

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9aldcit3 Bell - redirect

1 THE COURT: No. Thank you.

2 (Witness excused)

3 THE COURT: All set. OK. That takes us to the next

4 witness.

5 MR. STACK: Dr. Montgomery, your Honor, we would call.

6 THE COURT: All right. I have one notebook to give

7 back.

8 (Discussion off the record)

9 THE COURT: Please, would you raise your right hand.

10 WILLIAM DAVID MONTGOMERY,

11 called as a witness by the defendant,

12 having been duly sworn, testified as follows:

13 THE COURT: Please state your full name for the

14 record, both first and last, spelling both.

15 THE WITNESS: My name is William David Montgomery. I

16 go by my middle name David, D-A-V-I-D, Montgomery,

17 M-O-N-T-G-O-M-E-R-Y.

18 THE COURT: Thank you.

19 Now Mr. McGill is bringing you some water. Thank you.

20 DIRECT EXAMINATION

21 BY MR. STACK:

22 Q. Good afternoon, Dr. Montgomery.

23 A. Good afternoon.

24 Q. Can you tell the jury who your employer is?

25 A. I am employed by Charles River Associates.

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9aldcit3 Montgomery - direct

1 Q. And can you tell the jury, what is Charles River  
2 Associates?

3 A. Charles River Associates is a consulting firm. We work in

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4 business, finance, and economic consulting.  
5 Q. And what is your current position with Charles River  
6 Associates?  
7 A. I'm a vice president at Charles River Associates.  
8 Q. Can you tell the jury in a narrative fashion about your  
9 educational background?  
10 A. Yes. I grew up, attended school, attended high school in  
11 Philadelphia. I have a bachelor's degree from Wesleyan  
12 University in Connecticut. I spent a year as a Fulbright  
13 scholar studying economics at Cambridge University in England  
14 and I have a Ph.D. in economics from Harvard University.  
15 Q. When did you get your Ph.D.?  
16 A. In 1971.  
17 Q. Did you do a dissertation for your Ph.D.?  
18 A. Yes, I did.  
19 Q. Can you please tell the jury what your dissertation was  
20 about?  
21 A. Yes. The title was Markets and Licenses and Efficient  
22 Pollution Control Programs. It was the first theoretical  
23 investigation of how you could design and use an emission  
24 trading program for controlling pollution. Emission trading is  
25 the system that the Environmental Protection Agency adopted in

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1 about 1990 for controlling one form of emissions from electric  
2 power plants and the Congress is now debating in their Cap and  
3 Trade Program as a way of controlling carbon dioxide emissions  
4 that are indicated for global warming.  
5 Q. After you completed your education, what was your first  
6 full-time job?  
7 A. My first full-time job was an assistant professor of  
8 economics at the California Institute of Technology.  
9 Q. And how long did you stay at Caltech?  
10 A. I was at Caltech until about 1978. I took one year off in  
11 the middle there.  
12 Q. And what courses did you teach at Caltech?  
13 A. I taught environmental economics, I taught introductory  
14 economic theory, and I taught advanced economic theory to our  
15 graduate students.  
16 Q. And approximately when was it that you left Caltech?  
17 A. I spent one year in Washington on leave about 1975 to '76  
18 at the Congressional Budget Office, and then I came to work in  
19 Washington full-time with the Department of Energy in about  
20 1978.  
21 Q. And can you tell the jury, what type of work did you do for  
22 the Congressional Budget Office back in 1975/'76?  
23 A. I was an analyst in their Natural Resources and Commerce  
24 Division. I came to CBO thinking that I would continue working  
25 on what I specialized in before, which was environmental

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1 issues, but it was during the energy crisis of the 1970s and  
2 the office was working mostly on energy security issues and  
3 energy supply issues and so I found myself drawn into doing  
4 that.  
5 Q. Did you prepare any papers while you were there?  
6 A. Yes, I did. At CBO, I prepared papers on synthetic fuels  
7 loan guarantees, on energy financing, on evaluation of the -- I  
8 think that was the first project on independent energy

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9 strategies that were being proposed during the Ford  
10 Administration. And I was also commissioned at that time by  
11 the Senate Government Affairs Committee to do a major study of  
12 the oil price regulations, the oil price and allocation  
13 regulations that had been developed during the 1970s to try to  
14 control prices after the Arab oil embargo.

15 Q. And the oil price control study you did, did it look at  
16 gasoline prices?

17 A. Yes, it did. It was a study of -- I mean, the entire  
18 industry was regulated. So it studied everything from the  
19 regulations on crude oil production through the regulations on  
20 cost pass-through and controls on refined product prices,  
21 including gasoline.

22 Q. You said you returned to the federal government after being  
23 with the Congressional Budget Office. In what capacity did you  
24 return to the federal government?

25 A. Let's see. Just to keep the narrative going. I left

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1 Caltech -- sorry. I left the Congressional Budget Office after  
2 my year on leave. I went back to Caltech for about a year.  
3 Finished the work I was doing on the Senate Government Affairs  
4 Committee, and continued writing on oil price controls.

5 Then at the beginning of the Carter Administration, I  
6 came back. I was recruited by the Department of Energy to help  
7 form the Energy Information Administration, which was a new  
8 independent statistical and analytical group within the  
9 Department of Energy.

10 Q. And what role did you play in developing and forming the  
11 Energy Information Agency?

12 A. At that time I was in charge of an office that had  
13 responsibility for, well, basically all of the economic issues.  
14 So we -- I had a group with which we did a study of actually it  
15 was an interesting set of regulations then, the Fuel Use Act.  
16 The Fuel Use Act was going to ban use of natural gas by  
17 electric power plants and force their conversion to coal. And  
18 we did an extensive analysis of the costs of that.

19 We did analyses of tax policy and competition issues.  
20 I had that role at EIA for about two years, and then I was  
21 offered the job of Deputy Assistant Secretary in the Policy  
22 Office at the Department of Energy, and I couldn't resist doing  
23 that.

24 Q. With regard to your time at EIA, can you tell the jury what  
25 the SEDS database is?

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1 A. Yes.

2 THE COURT: How do we spell "SEDS" for the record?

3 MR. STACK: All caps, S-E-D-S.

4 THE COURT: Thank you.

5 A. Yes. The SEDS database is the State Energy Data System.

6 Just to kind of continue my career, after three  
7 years -- I guess, two years in the Policy Office as Deputy  
8 Assistant Secretary, we came to the end of the Carter  
9 Administration. I then took a couple of year -- two years when  
10 I was a researcher at basically the environmental think tank,  
11 Resources for the Future. And after that I returned to the  
12 Department of Energy and spent most of the 1980s back at the  
13 Energy Information Administration. So I moved around a bit in

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14 the government.

15 The State Energy Data System, or SEDS, was --  
16 actually, was a product of my office. It was one of the things  
17 that I was in charge of. And it was a system where we used  
18 kind of a full range of data from EIA, from the Federal Highway  
19 Administration, others, to do a comprehensive calculation of  
20 use of energy of all types by state. And gasoline consumption  
21 by state was one of the primary parts of that activity to  
22 figure out what gasoline consumption actually was.

23 Q. And the SEDS system, is it still in use today?

24 A. Yes, it is.

25 Q. You mentioned that you were the Deputy Assistant Secretary  
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1 in the Department of Energy. What were your duties and  
2 responsibilities at that time in handling policy?

3 A. That I was Deputy Assistant Secretary in the -- it was the  
4 late '80s to 1981. This was the period of the Iran/Iraq war  
5 and the second big oil price shock. In that office I was  
6 responsible for developing our, essentially, the outlook for  
7 energy supply and demand, mostly focusing on oil markets. What  
8 was going to happen to oil supply and demand in the U.S. and  
9 the world? How was that going to affect prices?

10 And that kind of provided the guidance for the  
11 planning and budgeting system within the Department of Energy.  
12 I kind of -- I was brought into the Policy Office when the  
13 former Deputy Secretary of Defense took over as Secretary, and  
14 my boss had worked for him in the Department of defense. We  
15 were trying to put into place a programming and budgeting  
16 system like they had in the Defense Department. So I was  
17 responsible for the overall guidance on where energy markets  
18 were going to go.

19 We worked on a number of topical issues, including  
20 energy taxation, economic impact studies, and some of the big  
21 issues then -- well, we were trying to look at how can we more  
22 efficiently allocate supplies in the United States. How can we  
23 protect against supply emergencies? So we were looking at  
24 issues like should Alaskan oil be exported and -- well, one of  
25 the perennial fights has always been about tankers and how they

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1 move gasoline and crude oil around between different ports in  
2 the United States. Because the Jones Act says that those  
3 shippers -- that those shipments can only go on ships with U.S.  
4 flags owned by U.S. companies with U.S. crews. There are only  
5 a limited number of them and they are very expensive. So the  
6 question then was could we adequately supply the needs of the  
7 United States or do we need to waive the Jones Act to let other  
8 ships come along.

9 Q. Were there supply problems during that period of time in  
10 the early '80s?

11 A. Yes, there were. We had gasoline lines appear both in  
12 immediately after the first Arab oil embargo in '74/'75 and  
13 then they returned during the Carter Administration in '78/'79,  
14 basically because there was more demand than there was supply.  
15 And we were -- and the things we were trying to -- and  
16 California, in particular, was very short on gasoline, which  
17 was one of the reasons we were looking at issues like Jones Act  
18 tankers and Alaskan oil exports, trying to figure out how to

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19 get oil to California.  
20 Q. You mentioned that you worked for Resources for the Future.  
21 Did you do any publications while you were there?  
22 A. Yes, I did. I wrote a book kind of basically based on my  
23 experience as Deputy Assistant Secretary. It was titled "Oil  
24 Prices, Energy Security and Import Policy," and it was a  
25 thorough economic investigation of those three issues.

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1 Q. Did you do any work at all in your government service on  
2 the interagency task forces relative to oil distribution and  
3 supply?  
4 A. Yes. While I was at the Energy Information Administration,  
5 between say '83 and 1989, I chaired an international -- an  
6 interagency task force that we called Data and Analysis Group.  
7 Its responsibility was for developing the information and the  
8 analytical tools that we needed in order to understand how  
9 likely oil supply disruptions were, where they might occur, and  
10 what kind of policies we could use to deal with them. We were  
11 also going to be the operational entity that would actually  
12 provide the government with data in the event that something  
13 actually happened.

14 And I was the chairman but the group was made up of  
15 representatives from the CIA, the Defense Department, the other  
16 economic agencies that would be involved and the Council of  
17 Economic Advisors.

18 Q. When you were with EIA, did you look at transportation and  
19 supply of gasoline in the United States?

20 A. Yes, I did. We were responsible for, first of all, the  
21 overall statistics that EIA calculated. And that included  
22 petroleum supply and demand, natural gas supply and demand, and  
23 integrating all of the different data systems that were run by  
24 basically the Petroleum Division, the Electricity Division of  
25 the agency. And the SEDS database in particular was one of

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1 trying to figure out exactly where the gasoline was getting to.  
2 I was also in charge of our international activities.  
3 And in the international activities, we studied basically  
4 supply and demand for oil and refined products worldwide, kept  
5 track of tanker movements, tanker rates, how the United States  
6 was dependent on imports both of crude and product from  
7 different regions of the world.

8 Q. Now, in looking at transportation supply of gasoline, did  
9 you become familiar with the pipeline system of supplying  
10 gasoline throughout the United States?

11 A. Yes, I did. It was something that I worked on for both  
12 because we were doing in fact a lot of work on both overall  
13 energy security. I chaired another group that produced a  
14 report for the -- for President Reagan on options for improving  
15 energy security. We were looking at all of those issues there  
16 about transportation, transportation links, their  
17 vulnerability, but, in particular, issues about regional  
18 petroleum reserves. Because the issue there -- again, it comes  
19 up perennially -- should there be a regional petroleum reserve  
20 in the Northeast in order to supply the Northeast if there are  
21 interruptions like happened a few years ago with Katrina, when  
22 the Gulf Coast was cut off. So we were studying those things,  
23 in the process looking at issues of transportation. I have

24 done a lot more of that since then.  
25 Q. With respect to EIA, did you play any role at all in  
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9aldcit3 Montgomery - direct  
1 developing forms to gather information about the transportation  
2 and movement of petroleum products like gas in the United  
3 States?  
4 A. We participated in kind of the reviews of those forms  
5 because, in particular, many of them are collected either by --  
6 much of that data was collected either by our Oil and Gas  
7 Office in EIA or by the Federal Energy Regulatory Commission,  
8 but we were a major user of those data. We were a user in two  
9 ways.  
10 One way was in preparing our publications, which were  
11 kind of EIA's flagship publications putting the data out. But  
12 in particular, we were concerned about understanding how  
13 gasoline was consumed and where it was consumed. Because we  
14 were responsible for the demand picture, what are people  
15 actually doing with energy. So we were very concerned about  
16 the quality of the data that was being collected from the oil  
17 and gas producers and whether it gave an accurate picture of  
18 how much was being shipped to various regions and how much was  
19 being consumed. So I was part of all of those reviews of the  
20 other data.  
21 And some other -- something -- there is more to that  
22 but I can't remember the rest of my answer right now.  
23 Q. Fair enough. Consolidated Energy Statistics, is there a  
24 report that is generated by EIA of that title?  
25 A. Yes.

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1 Q. Can you tell the jury what that is for the period of time  
2 that you worked with the EIA?  
3 A. When I was at the EIA, the Consolidated Energy Statistics  
4 were published in our Monthly Energy Review, in which every  
5 month we tried to give a picture -- it is about two or three  
6 months out of date -- of exactly what was happening in all of  
7 the energy markets. We published an Annual Energy Review which  
8 kind of contained updated and corrected data and went back in  
9 history. And then we also published both the State Energy Data  
10 System and the state energy price reports. They took us about  
11 two years to complete, because we had to wait for all of the  
12 rest of the data to come in and be checked both at EIA, at the  
13 other agencies, and then we could put all of that together. So  
14 it was a little slow but we believed it was a much more  
15 accurate picture of what was going on.  
16 Q. When the agency collected this data, did they collect data  
17 about what gasoline was being refined in the United States?  
18 A. Yes, they did.  
19 Q. Did you also collect data about what gasoline was being  
20 imported into the United States?  
21 A. Yes, they did.  
22 Q. And within the imports, were there statistics for both  
23 finished gasoline, which the jury has heard about, or  
24 components to be blended into gasoline?  
25 A. Yes.

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Montgomery - direct

1 Q. Did the EIA data that you were involved in compiling and  
2 reviewing in the period you were with the government also talk  
3 about demand or use of gasoline?

4 A. Yes.

5 Q. And did you look at use of gasoline in different regions of  
6 the country?

7 A. Yes, we did.

8 Q. Now, in the period of time that you were in government  
9 service, have you had occasion to testify -- in the period of  
10 time you were in government service, have you had occasions to  
11 testify to Congress?

12 A. Yes, I have.

13 Q. And how many times have you testified to Congress,  
14 approximately?

15 A. I've testified to Congress probably 30 or 40 times. I  
16 think probably a dozen or so times while I was in government  
17 service.

18 Q. And on what topics have you testified?

19 A. Let me see. This is going back away. I've testified on  
20 several of the studies that I did when I was in the  
21 Congressional Budget Office which dealt with energy issues, the  
22 Synthetic Fuels Loan Guarantee Program. That is a very old  
23 one.

24 When I returned to the Congressional Budget Office,  
25 which was my last job in government in the late 1980s, I was

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1 responsible for the Natural Resources and Commerce Division.  
2 So I testified to Congress on most of the major things that we  
3 had worked on. That included gasoline taxes, the Highway Trust  
4 Fund -- the place where gasoline taxes go -- infrastructure  
5 developments in the United States, there were a couple of other  
6 topics there. And I believe I testified a few times when I was  
7 working at the other agencies; I don't remember the exact  
8 topics.

9 Q. How many years total were you in government service?

10 A. About 15.

11 Q. And after you left government service, where did you go to  
12 work?

13 A. After I left government service, I came to work at Charles  
14 River Associates.

15 Q. And with regard to your work at Charles River Associates,  
16 have you been involved in doing analyses of market shares for  
17 energy use in the industries?

18 A. Yes, I have.

19 Q. With respect to the work that you've done for Charles  
20 River, have you also done work in defining and analyzing energy  
21 markets by geographic area?

22 A. Yes, I have.

23 Q. Could you tell the jury about your experience in that  
24 regard?

25 A. Yes. I started out when I came to Charles River Associates

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1 with the background we talked about in energy, but Charles  
2 River Associates does a great deal of work in antitrust  
3 litigation and in mergers. And so I spent a few years, if you  
4 like, in an apprenticeship, working with some of my senior

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5 colleagues -- with some colleagues who had been working in that  
6 field for a long time. And what I was doing with them was  
7 applying the FTC and Department of Justice guidelines for how  
8 to define geographic markets in order to -- and actually worked  
9 on projects dealing with a number of retail markets -- grocery  
10 stores, drug stores, food distribution systems -- and became  
11 expert in that process in both the data and the techniques for  
12 defining geographic markets and calculating market shares.

13 Then I started testifying myself on energy issues, and  
14 I've testified on geographic market definition and market  
15 shares. I submitted testimony to the Federal Energy Regulatory  
16 Commission dealing with mergers of electric utilities, with  
17 development of natural gas storage fields. And I have  
18 testified in actually several either other antitrust cases  
19 dealing, again, with the market definition of the geographic  
20 markets and market shares.

21 Q. At CRA, have you done studies of the economic impact of  
22 fuel regulations?

23 A. Yes, I have.

24 Q. Can you give the jury an idea of some of those studies?

25 A. Yes. We start in the -- in my early period of work with

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Montgomery - direct

1 Charles River Associates was during the development of the  
2 reformulated gasoline regulations. And I testified before the  
3 Environmental Protection Agency on some of the economic issues  
4 associated with the reformulated gasoline regulations. I  
5 testified for the Air Resources Board on issues about the cost  
6 effectiveness of reformulated gasoline versus other  
7 alternatives for reducing emissions from motor vehicles. And  
8 then have more recently done a series of studies on specific  
9 regulatory programs and how they would affect the refining  
10 industry.

11 I did a study of low sulfur diesel regulations, how  
12 they would affect refining capacity and the supply and  
13 distribution of diesel fuel.

14 There have been a couple of others.

15 Q. With regard to your work at CRA, have you done studies of  
16 U.S. and global oil markets and oil distribution for products?

17 A. Yes, I have. I didn't mention when I was at the Energy  
18 Information Administration, in addition to doing data, I was  
19 also responsible there for our forecast and our market  
20 analysis. And we had models of the world oil market as well as  
21 managing our big integrated model of the United States. That's  
22 one of the reasons we cared about the data system, because we  
23 needed data on petroleum supply and demand and distribution in  
24 order to get those models to work properly.

25 I have actually developed similar models to that with

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Montgomery - direct

1 coming to CRA. I hired a staff of trained modelers and  
2 mathematicians into our company, too. And there we developed a  
3 model of the world natural gas market which includes shipping  
4 rates, supply in the various regions of the world, demand in  
5 the various regions of the world, and, similarly, a model of  
6 the U.S. natural gas market with pipeline connections.

7 On the petroleum side, we have an integrated world  
8 model of energy markets and economies. And a key feature of  
9 that is our model of the world oil market, which tracks both

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10 refined product supply and demand, refined product exports and  
11 imports, and crude oil supply and demand and imports. And  
12 we've used that in a number of studies to look in particular at  
13 issues of how government policies that would affect the costs  
14 of refining in the United States would affect the viability of  
15 the U.S. refining industry, and the complementary part of that  
16 is if U.S. refiners produce less, where is it going to come  
17 from. That entails, again, looking carefully at where refined  
18 products are available in other parts of the world.

19 Q. Have you done studies of the horizontal and vertical  
20 structure of the oil industry in the United States?

21 A. Yes, I have.

22 Q. Tell the jury about that.

23 A. That first started at the Energy Information  
24 Administration. One of the things that I took responsibility  
25 for during the '80s was something we call the Financial

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1 Reporting System. The Financial Reporting System collected  
2 information on the financial performance, obviously, and kind  
3 of some operating data on the major oil companies. There was a  
4 data -- it was a survey that we had designed ourselves, and it  
5 is published every year in performance profiles. That really  
6 involved taking a look at both the horizontal and vertical  
7 structure of those industries.

8 It was the first place that any -- well, congress  
9 mandated it because they wanted to understand how much money  
10 the industry was making in refining versus how much money it  
11 was making in crude oil. So we were able to separate that  
12 vertical structure and then look at the marketing performance  
13 of the industry. And that was the beginning of my experience  
14 with it.

15 I've continued and have done several studies dealing  
16 with refined product distribution in the United States.  
17 They've included, for example, studies I mentioned. Low sulfur  
18 diesel was in part an investigation of where the diesel fuel  
19 would be available. I have done studies of what you may  
20 remember, the Northeast heating oil crisis about ten years ago,  
21 when the heating oil prices went through the roof and it was  
22 not available in much of New England. And, more recently, I  
23 had a study published in the Journal of Competition Law and  
24 Economics, which was in part looking at the effects of Katrina  
25 and how that affected both import demand and the movement of

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1 products within the United States in order to actually quite  
2 successfully get enough gasoline down to the Gulf Coast so that  
3 people could get away from their homes, could get out and get  
4 away from the hurricanes.

5 Q. In the studies that you have done of horizontal and  
6 vertical structure of the oil industry, have you looked also at  
7 gasoline and the gasoline marketing?

8 A. Yes, I have. That was a important part in particular of  
9 what I was doing with -- well, yes, I have all the way through  
10 because gasoline marketing has consistently been an important  
11 part of the issue on energy security. Will it be possible to  
12 get gasoline delivered to consumers to avoid gasoline lines,  
13 how did that work during the period of Katrina when we had a  
14 sudden drastic shutoff in one part of the country. So I have

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15 looked carefully at marketing there as well as, in a couple of  
16 other studies, looking at the market structure of both the  
17 refined products versus the ethanol industry.

18 Q. With respect to your professional work, have you published  
19 articles in peer-reviewed journals?

20 A. Yes, I have.

21 Q. Approximately how many have you had published in  
22 peer-reviewed journals?

23 A. I would say journals probably about 35, and then probably  
24 another 15 chapters in peer-reviewed books.

25 Q. Have you previously testified for ExxonMobil?

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1 A. No.

2 Q. Have you previously testified against ExxonMobil?

3 A. I don't think so.

4 MR. STACK: With regard to Dr. Montgomery, your Honor,  
5 we would proffer him an expert in energy economics, including  
6 the calculation of market share for refined product share in  
7 geographic areas of the country, as well as national and  
8 international petroleum transportation and distribution, and  
9 the analysis of data relating to energy markets, including  
10 gasoline supply.

11 MR. CHAPMAN: I'll go into that on cross-examination  
12 but it is acceptable now, your Honor.

13 THE COURT: OK. Good. All right.

14 You may proceed, then.

15 MR. STACK: Thank you, your Honor.

16 BY MR. STACK:

17 Q. What tasks were you asked to undertake in this case?

18 A. The first task that I was asked to undertake was to  
19 calculate the share of gasoline containing MTBE that was  
20 refined or manufactured by ExxonMobil and delivered to New York  
21 Harbor, the ratio of those deliveries to New York Harbor by  
22 ExxonMobil to the total pool of gasoline in New York Harbor.

23 THE COURT: During what time period?

24 THE WITNESS: Ah, during the time period -- during  
25 entire time period from 1983 to 2005. As I'll describe, I

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1 broke that up into the -- sorry, I misspoke. From 1983 -- 1985  
2 to 2003. I broke that up into the 1995 to 2003 period, which I  
3 will be talking about first.

4 THE COURT: I'm sorry. Say that again. You broke it  
5 up into?

6 THE WITNESS: The 1995 to 2003 period, which was the  
7 reformulated gasoline regulations, and then the prior period  
8 from 1985 to 1994.

9 THE COURT: OK. Thank you.

10 BY MR. STACK:

11 Q. In addition to calculating the share of ExxonMobil gasoline  
12 in New York Harbor, were you asked to do any other tasks?

13 A. Yes. I was also asked to calculate the retail market  
14 shares in the New York region for ExxonMobil and for other  
15 participants in the retail market for other brands in the  
16 retail markets.

17 Q. And can you explain to the jury at this point what the  
18 difference is between percentage of refined gasoline versus  
19 market share in the retail markets?

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20 A. Yes. The difference has to do with both the logistics and  
21 the supply practices of basically the oil industry.  
22 The first calculation that I did looked at how much  
23 gasoline was actually manufactured in an Exxon or Mobil  
24 refinery and how much of that actually reached New York Harbor  
25 from all the different routes. And I took the ratio of that to

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1 the total amount of gasoline in what I believe you have -- in  
2 what has been called a commingled pool of gasoline in New York  
3 Harbor. So that's one calculation.

4 And my understanding was that that was intended to  
5 assist the jury in allocating responsibility or liability under  
6 a commingled product theory of liability, where all of those  
7 products are commingled and where what matters is who actually  
8 refined or manufactured the gasoline containing MTBE.

9 Now --

10 Q. Why retail market share?

11 A. I understand that retail market share was intended to  
12 assist the jury in allocating liability under different  
13 theories that do not focus on the question of who manufactured  
14 the gasoline and how was it commingled.

15 MR. CHAPMAN: Your Honor.

16 THE COURT: Let me review that answer. One moment.  
17 (Pause)

18 MR. CHAPMAN: Your Honor, I have no problem with  
19 Dr. Montgomery testifying about what his assignment was, but  
20 his understanding of issues of liability is beyond the scope of  
21 his expertise. It is not relevant. I move to strike both this  
22 and the prior answer about his understanding of the liability  
23 issues.  
24

25 THE COURT: Yes. I suppose that's right. I will

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1 strike both answers.

2 But he meant well. He was just trying to explain his  
3 assignment. I don't think he meant to take over the Court's  
4 function.

5 So the Court will explain to you, the jury, different  
6 theories of liability and allocations of responsibility. That  
7 is my job. But he was just trying to explain why he undertook  
8 the analyses he undertook. I'll leave it at that.

9 Is that acceptable?

10 MR. CHAPMAN: Thank you, your Honor.

11 THE COURT: All right. Go ahead.

12 BY MR. STACK:

13 Q. With respect to calculating the share of Exxon gasoline in  
14 New York Harbor, did you actually break that out by years?

15 A. Yes, I did.

16 Q. And can you tell the jury, what data did you look at to  
17 actually break that out?

18 A. The data that I look at -- again, this is for the first  
19 calculation -- how much gasoline containing MTBE did ExxonMobil  
20 manufacture, how much of it got to New York Harbor, and what's  
21 that as a ratio of total demand.

22 The basic data sources that I used for that for demand  
23 for gasoline, the total amount of gasoline in New York Harbor,  
24 all came from public data sources. It came from the EIA SEDS,

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S-E-D-S, data system. It came from EIA data on petroleum  
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1 imports into the United States, and on petroleum shipments  
2 between big regions of the country and/or U.S. Army Corps of  
3 Engineers data on shipments between smaller parts of the  
4 country.  
5 For Exxon's shares, I used data that were obtained as  
6 part of this process from Exxon, from the Colonial Pipeline and  
7 other pipelines that serve New York, and then from the same  
8 data sources, from the Corps of Engineers and from EIA. Again,  
9 essentially getting back the forms that Exxon and Mobil had  
10 filled out and sent to EIA so that I could get the data on  
11 their shipments. I think that's comprehensive but I'm probably  
12 forgetting something.

13 Ah, I also used some data from the Federal Energy  
14 Regulatory Commission on pipeline shipments.  
15 Q. Is there any one place where the Court or the jury can go  
16 and actually find this number, or is it something you have to  
17 calculate?

18 A. It's something you have to calculate.

19 Q. And with regard to the number, did you express it as a  
20 volume or a percentage?

21 A. I had expressed it in my opinion about the shares as a  
22 percentage, but I did all the calculations in volumes.

23 Q. And were you able to, in the course of your work, actually  
24 calculate the volume that every other refiner, blender,  
25 supplier is putting into the New York market?

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1 A. Yes.  
2 Q. And did you do that by individual companies or did you do  
3 it in the aggregate?  
4 A. No. I had to do it in the aggregate, because we have no  
5 data on all -- there is no source of comprehensive data on  
6 every individual company. So that to put together -- so that  
7 for the demand side, that is, the total amount of gasoline that  
8 goes through New York Harbor in a year, I had to use aggregate  
9 statistics for doing that.

10 Q. Now, in your work in this case, did you prepare a chart  
11 showing percentages of gasoline in New York Harbor refined by  
12 Exxon and Mobil during the years 1985 to '94?

13 A. Yes, I did.

14 Q. Can you tell the jury, and I believe the judge asked you as  
15 well but I will make sure, why did you pick the period '85 to  
16 '94?

17 A. The reason I picked the period '85 to '94 is that's prior  
18 to the promulgation of the reformulated gasoline regulations by  
19 the Environmental Protection Agency. And it differs from the  
20 period from '95 through 2003, because from 2003 -- from 1995 to  
21 2003, all of the county -- no, the region that we're looking at  
22 in New York Harbor was pretty much required to use reformulated  
23 gasoline. Therefore, I could focus on data on reformulated  
24 gasoline. I had to focus on data on reformulated gasoline to  
25 calculate those shares properly.

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1 Before 1994, there was no reformulated gasoline so the  
2 only data that were available that were useful were data on all  
3 gasoline. So it's essentially two different very similar but  
4 different calculations that I had to do for those two different  
5 periods.

6 Q. And did you prepare a graphic to illustrate what the  
7 percentage of ExxonMobil gasoline was in New York Harbor during  
8 the years 1985 to '94?

9 A. Yes, I did.

10 Q. Are those statistics in your report?

11 A. Yes, they are.

12 Q. Could we go to slide one, please.

13 Can you explain to the jury what this bar chart  
14 illustrates?

15 A. What this bar chart illustrates is the top is 100 percent,  
16 and the gray bars at the bottom represent Exxon's share of that  
17 total amount of gasoline that flowed through New York Harbor in  
18 each of those years.

19 The percentages vary over time. It starts out rather  
20 low. It gets up in the 20 to 25 percent range. And then from  
21 1993 on -- no, between 1993 and '94, it drops down to about  
22 5 percent. So the average, taking the total volume that was  
23 refined and manufactured by Exxon and got to -- and Mobil that  
24 got to New York Harbor and dividing it by the total of  
25 everyone's gasoline that was delivered to New York Harbor comes

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1 out to an average of just over 14 percent.

2 Q. And did you also for the period from 1995 to 2003 calculate  
3 the percentage of reformulated gasoline made by Exxon that  
4 actually was delivered to and transported out of New York  
5 Harbor?

6 A. Yes, I did.

7 Q. And could we go to slide two, please.

8 Can you explain slide two to the jury?

9 A. Yes, slide two is now based on reformulated gasoline. So  
10 the 100 percent represents 100 percent of the reformulated  
11 gasoline that was delivered into New York Harbor by anyone, and  
12 the gray bars at the bottom represent the share of that that  
13 was -- that I calculate to have been refined and manufactured  
14 by Exxon or Mobil, or ExxonMobil.

15 Q. ExxonMobil is a very big company. There are a lot of Mobil  
16 stations in New York, a lot of Exxon stations in New Jersey.  
17 Can you explain why this percentage is so low that we see so  
18 many of these ExxonMobil stations?

19 A. Yes. It really looks strange; there is no question about  
20 that. But the reason is that most of the gasoline that is  
21 being sold in those stations was actually refined by someone  
22 else, and was through the various types of exchange and  
23 purchase agreements that go on in the industry, was then moved  
24 to -- was then delivered to those stations as branded gasoline.

25 But it's just very -- but only a very small part of

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1 that gasoline was actually refined or manufactured by  
2 ExxonMobil. And the reason for that is there are really two  
3 big routes by which gasoline gets to New York Harbor. One of  
4 them is by pipeline coming from the U.S. Gulf Coast, where  
5 Exxon and everybody else has lots of refineries in the Texas,

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6 Louisiana area. The problem is that although Exxon has a lot  
7 of gasoline there, only a very small part of Exxon's gasoline  
8 actually makes it all way up that -- it is 5500 miles of  
9 pipeline going in various directions that it gets onto in  
10 Louisiana. Most of it comes off that pipeline before it gets  
11 to New York.

12 So although Exxon starts out manufacturing a lot of  
13 gasoline with MTBE in the Gulf Coast during these years, only a  
14 relatively small fraction of it reaches New York on the  
15 pipeline from the Gulf Coast.

16 Q. Where does it go?

17 A. It goes to all of the rest of the regions between here and  
18 there. It supplies markets in -- it goes through Mississippi,  
19 so there is the Birmingham, Montgomery area. It goes through  
20 Georgia. It swings up through North Carolina. Those -- the  
21 Sun Belt has just grown tremendously and takes off a lot of  
22 that demand. There is a huge interchange in Greensburg, North  
23 Carolina, where product comes off of the pipeline and then it  
24 proceeds up through Virginia, through the Washington area. In  
25 Philadelphia -- another big slug of gasoline is put into it by

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1 the Philadelphia refineries, which dilutes what's left of the  
2 Exxon or Mobil gasoline. And then what's left gets up here.  
3 Q. Now, if we look at the slide number one, we see percentages  
4 of 23, 11, 5.6. Why the big drop from? '92 to '94? And if you  
5 go to the next one, Dave, continuing into '95. Why is that  
6 drop there?

7 A. That is the Bayway Refinery.

8 The other big source of gasoline for New York Harbor,  
9 of course, is refineries in New York Harbor. And as we see  
10 here -- let me use the pointer.

11 There are two refineries in New York Harbor, a Hess  
12 refinery and the Bayway Refinery near Linden, New Jersey.  
13 Bayway was owned by Exxon through the -- from the 1985 up to  
14 1993 -- sorry. Bayway was owned by Exxon through the entire  
15 earlier period, from '85 to '94. It's Bayway's production  
16 that's responsible for those 25 to 30 percent shares of  
17 production during most of the 1980s.

18 It was sold to Tosco in 1993, if I remember correctly.  
19 And at that point Exxon's share dropped off, because it was no  
20 longer manufacturing the gasoline in New York Harbor.

21 I guess I should mention the other thing in the later  
22 period, from 1994 through 2003, the biggest source of gasoline  
23 for New York Harbor was imports from overseas. And Exxon and  
24 Mobil just were responsible for only a tiny share, a really,  
25 really tiny share, a couple of percent of the imports that were

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1 coming from other countries, and that's because the refineries  
2 that were affiliated with Exxon and Mobil in other countries  
3 just weren't in regions where it was economic to serve the  
4 United States.

5 Q. Now, on this particular slide, slide three, you identify  
6 sources of gasoline?

7 A. Yes.

8 Q. Can you explain what the various arrows are and, touching  
9 on it, explain to the jury what that indicates?

10 A. Yes. The foreign countries' arrow indicates imports that

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11 are coming in from outside the United States. We have good  
12 data on those from the EIA 8/14 survey. We know what country  
13 they come from. We know who was the importer.

14 By water from the Gulf Coast, it is possible to ship  
15 refined products, gasoline, all the way from Texas and  
16 Louisiana by barge or small ship up to New York Harbor. It  
17 doesn't happen very often because much cheaper to put it on  
18 that big pipeline.

19 We also -- I'm sorry.

20 Q. No. Go ahead.

21 A. We also have a big refining complex in Philadelphia, and  
22 some refineries in Virginia and that come out of the Potomac  
23 and the James River. So we also have shipments from those  
24 mid-Atlantic refineries. And then the big part of the story  
25 for our purpose is the big pipeline that picks up the product

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1 in the Gulf Coast, makes deliveries along the way, and then  
2 picks up more product in the Philadelphia area.

3 Q. Does all of the gasoline that finds its way to New York  
4 Harbor actually stay there?

5 A. No.

6 Q. Where does gasoline in New York Harbor go once it is  
7 delivered to the harbor?

8 A. Well, it -- again, this depends on the period. And maybe  
9 we could take a look at the next slide.

10 Q. Yes. Slide four.

11 A. This is a map that helps us with the period from 1994 to  
12 2000 -- for the RFG period, from 1995 to 2003. Essentially,  
13 the New York Harbor serves in that period these counties that  
14 are outlined in dark blue with reformulated gasoline. Those  
15 are the counties in New York State that were required to use  
16 reformulated gasoline. So we know that all of the gasoline  
17 that's consumed in these counties is reformulated gasoline.

18 Q. Do we know how much in terms of annual RFG demand?

19 A. Yes, we do.

20 Q. Could you go to slide five, please.

21 A. It's about 70 million barrels per year in the New York  
22 area, which is just what's outlined in blue, and that's  
23 reformulated gasoline.

24 The New Jersey -- the entire State of New Jersey was  
25 required to use reform --

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1 MR. CHAPMAN: Your Honor, if we might, just for  
2 foundation, if it's true that there are statistics and they  
3 know how much it is, why is this an approximate figure, which  
4 is what the title is?

5 THE WITNESS: It's an approximate figure because it  
6 was the only -- because I could remember 70, 55, 45 to talk to  
7 the jury, but I'm not very good at remembering more precise  
8 fractions. All of my calculations were done with the exact  
9 underlying numbers, as I showed in the previous slides.

10 THE COURT: Do you mean you rounded?

11 THE WITNESS: I rounded this to the nearest zero or  
12 five so that I could remember.

13 THE COURT: Instead of 69.324, or something?

14 THE WITNESS: It probably was 54 and I think 46 or 47,  
15 but this was just something I was trying to do to give a

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16 representation of the relative magnitudes in the different --  
17 during this period in the different regions. The precise  
18 numbers are there, and any calculations where I talk about  
19 shares, I've used the exact numbers and made the exact  
20 calculations.

21 THE COURT: OK. Thank you.

22 BY MR. STACK:

23 Q. Apart from delivery of gasoline to these areas, is there  
24 gasoline that actually goes to areas outside the areas depicted  
25 on this map?

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1 A. Yes. The area that I've depicted in blue is what I would  
2 call the area served directly -- well, blue and orange is what  
3 I would call the areas served directly by New York Harbor.

4 In addition, New York Harbor is the source of a large  
5 part of the gasoline that's consumed by New England because  
6 it's the last stop for those pipelines that come up to Linden,  
7 New Jersey, and then from there it moves from the kind of  
8 commingled pool in New York Harbor up to New England. And I  
9 calculated that that was about 45 million barrels per year.

10 Q. And did you also calculate for the entirety of New England  
11 what the total number of millions of barrels per year would be  
12 for all of New England based on shipping out of the New York  
13 Harbor?

14 A. Yes, I did. This 45 -- I'm sorry. Go back for a second.  
15 This 45 was actually one of the harder things to come  
16 up with, because we do not have data on shipments of  
17 reformulated gasoline from New York Harbor to New England  
18 because it's only the Army Corps of Engineers that has that  
19 data, and they don't care whether it is reformulated gasoline  
20 or regular gasoline. So I had to do a more complicated set of  
21 calculations to essentially back out that 45 million barrels  
22 per year.

23 Q. And with regard to New England, did you prepare a graphic  
24 showing the area you were looking at for analysis of what the  
25 demand would be in New England for the entire area?

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1 A. Yes, I did.

2 Q. The next slide, please.

3 Can you tell jury what this shows?

4 A. What this shows is essentially the area of new England for  
5 which I was calculating demand. I'm sorry about cutting off  
6 Maine, but it was the Maine, New Hampshire, Vermont,  
7 Massachusetts, Rhode Island, Connecticut area. And for that I  
8 calculated the demand for reformulated gasoline of 125 million  
9 barrels per year.

10 Q. And can you tell the jury why it is 45 on one side and 125  
11 on the other?

12 A. Yes, I can. The reason is that, like New York Harbor, New  
13 England's demand is satisfied from several different sources.  
14 New England also receives a large amount of its gasoline from  
15 imports from foreign countries and some that moves directly  
16 from either the mid-Atlantic, you know, this region down here,  
17 or all the way from the U.S. Gulf Coast.

18 Q. Now, when you calculated your percentages for RFG, did you  
19 take into account all of the supply and demand into the harbor?

20 A. Yes.

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21 Q. And did you prepare a graphic to show the jury how you  
22 calculated this percentage of fraction?

23 A. Yes.

24 MR. STACK: Can you go to slide 17, please.

25 THE COURT: Actually, how would you feel about not  
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1 doing slide 17?

2 MR. STACK: Perfect.

3 THE COURT: All right.

4 So, ladies and gentlemen, we'll take our luncheon  
5 recess now, and we will reconvene hopefully at 10 after 2. So  
6 you have 70 minutes because we have some work to do. Ten after  
7 2. Thank you.

8 (Continued on next page)

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1 (Jury not present)

2 THE COURT: All right. Please be seated.

3 You can go. Please be seated. I need a couple of  
4 minutes of the lawyers' time but it doesn't matter if you  
5 remain in the courtroom because you are on direct, you are  
6 welcome to talk to those lawyers. You just don't need to stay  
7 here for a moment. I need to talk to them about another quick  
8 matter.

9 I said that I would place some reasoning on the record  
10 with respect to the public nuisance decision that I sent you  
11 last night, basically that there needs to be an injury to  
12 support the claim. I am just going to read a short little  
13 memo.

14 The city agrees that if it cannot show an actual or  
15 future injury, it may not recover money damages for the public  
16 nuisance claim, although it does say it might still be able to  
17 get injunctive relief, and there is some support for this  
18 position in the case law. I cite, in particular, State v.  
19 Fermenta. I know you are all familiar with that.  
20 F-E-R-M-E-N-T-A, 630 N.Y.S.2d 884, a 1995 case, which says, and  
21 I quote: "It has been said that a court of equity will lend  
22 its aid to enjoin a threatened public nuisance wherever it  
23 clearly appears that the acts sought to be restrained will  
24 necessarily result in the creation or maintenance of a  
25 nuisance."

9A1JCIT4 Montgomery - direct

1 "When a harm feared does not yet exist, the state must  
2 show a menace of imminent and substantial import to the public  
3 welfare to obtain the equitable relief.

4 "The problem, however, is if the jury finds that the  
5 city has not and will not be injured by MTBE within the next 30  
6 years, then the city surely cannot prove that the MTBE poses a  
7 menace of imminent and substantial import to the city or that  
8 Exxon's conduct will necessarily result in a nuisance."

9 In other words, once it has been determined there will  
10 be no future injury, then there clearly can't be a threatened  
11 injury that would support the injunctive relief.

12 So if the jury finds that there is no present or  
13 future injury, there is nothing left for the jury to decide  
14 with respect to that claim. If there is anything remaining of  
15 the public nuisance claim with respect to injunctive relief,  
16 that will be for the court, but the city's hurdle would be very  
17 high because the city hasn't shown what injunctive relief it  
18 can get or ask for absent a showing of past or future injury.  
19 So the bottom line is there is no point in sending this on to  
20 the jury if the jury answers "no" to Question 1, unlike the  
21 trespass claim. So that issue has been put to bed.

22 Then I have a letter from the city which I haven't had  
23 a chance to study, but I want you to know I received it. The  
24 title is regarding inventory control issues raised today.

25 MR. SHER: Your Honor, there was a question yesterday.

9A1JCIT4 Montgomery - direct

1 THE COURT: I understand why you wrote it. I  
2 understand it responds to the question the court asked about  
3 Exxon/Mobil's control over the lessee dealer stations, and  
4 while I haven't had a chance to even read it yet, I think in  
5 summary it does say that the stations had to report to Exxon,  
6 something like that. It re-raises that question of control,  
7 which reminds me, you also had homework, too, with respect to  
8 the consent decree. You were going to show me the actual  
9 language. Do you have it?

10 MR. SACRIPANTI: As I understand it, the city agrees  
11 they owned and controlled the tanks.

12 THE COURT: So that --

13 MR. SACRIPANTI: I believe that is what Ms. Amron said  
14 this morning.

15 MS. AMRON: We agree the city owns and controls -- one  
16 of the tanks isn't there any more -- tanks at the two  
17 precincts.

18 THE COURT: So, therefore, essentially you're agreeing  
19 on the res ipsa charge with respect to the contributory?

20 MS. AMRON: No. We think we're in a different  
21 position than retail gasoline stations in that we are not in  
22 the gasoline business, we are not selling it.

23 THE COURT: Right.

24 MS. AMRON: We have gasoline that we are using simply  
25 for our own purposes or at the precincts.

9A1JCIT4 Montgomery - direct

1 THE COURT: True, but if you had control over the

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2 property and control over the tanks, and the tanks leaked, the  
3 whole idea of res ipsa, there is no way it leaked unless  
4 something was defective in that tank, and you own and control  
5 them. So it happened, you must have been negligent -- in other  
6 words, you had the tanks. It got out of the tanks. The only  
7 thing that skips is the filling aspect.

8 MS. AMRON: It skips the filling aspect. It skips any  
9 knowledge we would have about the nature of MTBE in the tanks  
10 or in the petroleum which we don't -- we are not Exxon, we are  
11 not part of the --

12 THE COURT: I understand. Yes, I understand the  
13 argument. I have no decision yet, but I understand the  
14 argument.

15 I think I made much of that argument yesterday myself  
16 about vertically integrated and you're not in the oil business  
17 and you don't deliver and all the rest of it.

18 MS. AMRON: We have no duty with respect to --

19 THE COURT: Now --

20 MS. AMRON: -- MTBE or warning anyone about MTBE.

21 THE COURT: And the warnings point, right.

22 MR. SACRIPANTI: Your Honor, I know of no exception to  
23 the res ipsa rule. Obviously, we objected to res ipsa  
24 generally.

25 THE COURT: Correct.

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9A1JCIT4

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1 MR. SACRIPANTI: If the court is going to imply  
2 because of our exclusive control over the tanks at the station  
3 at issue for us or one or possibly two?

4 THE COURT: I don't know where that is up to.

5 MR. SACRIPANTI: That applies to them.

6 THE COURT: I haven't made that decision yet. The  
7 difference is only the control over the whole process, so to  
8 speak, the knowledge issue, the warnings issue, the delivery  
9 issue even though Mr. Stack informed me yesterday about the  
10 different trucks and different companies that deliver, I  
11 understand all of that.

12 MR. SACRIPANTI: Can I make one other point on this  
13 issue, your Honor? And that point is again I come back to the  
14 fact that the city was sued for not complying with the federal  
15 and state regulations regarding its tanks. It leaked gasoline  
16 as a result of that.

17 THE COURT: Right.

18 MR. SACRIPANTI: I think that's a critical element in  
19 this issue as well because it shows the city knew its tanks  
20 were leaking, ignored that, continued to allow it, had to be  
21 pursued.

22 THE COURT: I suppose their argument there is while  
23 that might be true, they didn't know the consequence of their  
24 negligence, so to speak, with respect to MTBE. So they knew  
25 that gasoline would get out. Did they know that what MTBE

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1 does? It travels faster and further, lasts longer, is not  
2 biodegradable? Did they know all of that?

3 It raises some issues. I am not prepared to rule on  
4 anything. I wanted to announce what I could rule on, which was  
5 the public nuisance, that I got this letter and I am awaiting  
6 your changes. I was now told they would be here by 2:00 with

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7 respect to the charge. I hope to turn around the charge.  
8 You'll have it before summations. You have one change by  
9 e-mail because I know you're getting e-mail as you sit here,  
10 just a stylistic change where I think we improved the charge by  
11 getting a little repetition out. You will see. We'll  
12 distribute those two pages to you soon. You can take a look at  
13 that. That is not substantive.

14 With that we can break for lunch?

15 MR. SACRIPANTI: Just on the record, your Honor, there  
16 are documents in this case in evidence that shows the city's  
17 knowledge of MTBE I think as early as I believe it is 1995, but  
18 it may be beforehand.

19 THE COURT: Let's say it is 1995. When was this  
20 accused conduct with the consent decree? When was that? I  
21 don't know the dates of that. Do you?

22 MR. SACRIPANTI: I don't have the consent order in  
23 front of me.

24 MS. AMRON: At least one of them was after that, your  
25 Honor. I don't recall precisely with the first one. I know

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1 the tank that was at one of the stations that was removed was  
2 removed in '96 -- not station -- precinct was removed in '96,  
3 and the evidence with respect to the city's knowledge was that  
4 MTBE moved farther and faster, we knew that at the end of '96  
5 after we acquired the system and found MTBE.

6 There is no evidence about any knowledge about the  
7 impacts or injury caused by MTBE, that the city had any of that  
8 knowledge previously.

9 THE COURT: All of this is my problem to sort through.  
10 I will. If there is nothing further right now?

11 MR. SACRIPANTI: Yes.

12 THE COURT: What happens after Montgomery?

13 MR. CHAPMAN: That may well be it, your Honor.

14 THE COURT: You don't have a person on this subject?

15 MR. CHAPMAN: We do, but what I am hearing from Mr.

16 Montgomery so far, I don't think we are going to do it.

17 THE COURT: Do they know that?

18 MR. CHAPMAN: Tallett.

19 THE COURT: Okay. See you at 2:10.

20 (Luncheon recess)

21 (Continued on next page)

22

23

24

25

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Montgomery - direct

1 AFTERNOON SESSION

2 2:10 pm

3 (Trial resumes)

4 (In open court; jury present)

5 THE COURT: Please be seated.

6 Let me use this moment as I have on other occasions to  
7 talk about tomorrow. I think even though I don't love it and I  
8 am sure you don't, either, we still need to meet at 9:00 even  
9 though we're staying till 4:00. We want to be sure we can  
10 accomplish what we think we can accomplish. Let's not risk it.

11 On the other hand, the court is more than happy to buy

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12 you a full, full lunch, ordered lunch from a vendor, either the  
13 lunch from the diner or the pizza or whatever it is you want.  
14 when you come in, I guess Mr. Riley will leave menus and you'll  
15 write him notes. If you go for the pizza deal, tell us what  
16 topics you want. If you go for individual orders, that is  
17 fine, too.  
18 We'll do lunch, real lunch, but we'll start at 9:00.  
19 we'll still have the coffee break at some point to keep you  
20 going because it will be a long day. We'll have coffee at  
21 11:00 or something, lunch at 1:00 and see where we end. That  
22 is the only announcement I need to do right now.  
23 WILLIAM DAVID MONTGOMERY, resumes  
24 DIRECT EXAMINATION (Continued)  
25 BY MR. STACK:

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1 Q. When we broke, we were looking at Slide 17. This graphic  
2 is entitled RFG calculation methodology. Can you tell the jury  
3 what this illustrates?  
4 A. The first thing this illustrates is that I'm simply  
5 calculating a fraction, and there is nothing more complicated  
6 to it than that each year, also to sort out what goes in the  
7 numerator on top and what goes on the denominator on top the  
8 bottom.  
9 The top is the amount of gasoline, in this case  
10 reformulated gasoline, refined or manufactured by Exxon/Mobil  
11 and it can get to New York Harbor by one of three sources: The  
12 Colonial Pipeline, by water from other parts of the U.S. as we  
13 were looking at the map or by water from international sources.  
14 So that is the top part.  
15 The bottom part is the demand for reformulated  
16 gasoline from New York Harbor. In looking at the share of  
17 Exxon/Mobil's produced gasoline in the co-mingled product in  
18 New York Harbor, we need a number for how much of that  
19 co-mingled product there is.  
20 The basic idea in economics is supply equals demand.  
21 Each year what I have done is calculate the total demand for  
22 reformulated gasoline from New York Harbor because that is the  
23 total amount everyone has delivered to the harbor. That will  
24 equal New York, New Jersey consumption in this case plus  
25 deliveries go out of New York Harbor to somewhere else from

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1 that same pool.  
2 Q. Looking at the denominator, in the bottom, looking at New  
3 York City consumption and deliveries out of the harbor, how did  
4 you calculate demand?  
5 A. I calculated demand by actually each of those cases I  
6 calculated it with slightly different data source. For New  
7 York, if you remember back to that map we had up there, we have  
8 a specific set of counties that had used reformulated gasoline.  
9 The New York State Energy Research & Development Administration  
10 for most of this period was actually reporting gasoline  
11 consumption in those counties. We know it is reformulated  
12 gasoline because that is all they can consume. I added it up  
13 for the right set of counties.  
14 For New Jersey, the state did not collect county level  
15 data on gasoline consumption, but it did collect data on  
16 vehicle miles traveled, how much driving there was in each

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17 county. I took the total amount of driving in of these North  
18 Jersey counties, divided it by the total amount of driving in  
19 the state, and used that to calculate how much of the  
20 reformulated gasoline was consumed in these counties.

21 The border counties, Monmouth, Sandy Hook and on down  
22 the shore, Hunterdon and Warren along the Delaware River, they  
23 are probably supplied mostly from other places than New York  
24 Harbor, but I included 50 percent of the consumption in those  
25 places. That is New Jersey.

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1 One more point I can make about that. For New  
2 England, I had to calculate the consumption a little bit  
3 differently because for New England I had to start -- the Army  
4 Corps of Engineers did not calculate how much moves from New  
5 York Harbor up to New England. They calculate the total  
6 gasoline, not reformulated.

7 I can calculate how much reformulated gasoline is  
8 consumed in New England. We showed that. I put data on how  
9 much came in from other sources. The difference between those  
10 gives me the amount of demand for gasoline coming out of New  
11 York Harbor.

12 Q. Did you identify and chart out for the jury the sources of  
13 RFG to New England from 1995 to 2003 to show backed out?

14 A. Yes.

15 Q. Slide 7, please.

16 Explain what this slide shows.

17 A. Yes, this shows in schematic form, there is New England and  
18 there are new -- New England has no production of its own of  
19 gasoline. So it gets gasoline from international refineries,  
20 it gets it from New York Harbor. These numbers show the rough  
21 amounts.

22 It gets it from Mid-Atlantic refineries, the  
23 Philadelphia, Wilmington, Virginia area. It gets some that  
24 comes all the way around from the Gulf Coast by barge, and  
25 that's because everything that comes up from the Gulf Coast

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1 except by barge ends up in New York Harbor and it goes to New  
2 England from New York Harbor.

3 Those are the four sources and those are the numbers I  
4 calculated from generally the data sources I indicated which  
5 are the, for the shipments, EIA, international data, EIA data  
6 on shipments from the Mid-Atlantic -- sorry, the Gulf Coast to  
7 Pad 1 B, and I did have to make one assumption.

8 For these shipments from the Mid-Atlantic refineries  
9 to New England, all I had was Corps of Engineers' data. The  
10 Corps of Engineers only reports total gasoline, so in order to  
11 be conservative, I assumed all of the gasoline that was shipped  
12 out of the Mid-Atlantic refineries went to New England and it  
13 was all reformulated gasoline.

14 I know when I do that, I am overestimated  
15 Exxon/Mobil's share because surely not all of it was  
16 reformulated, but I was trying to make the assumptions, tried  
17 throughout these calculations to make sure I didn't miss  
18 anything that might be contributing to their share.

19 Q. Did you ultimately determine what percentage of the  
20 gasoline in RFG during the '95 to 2003 period went to these  
21 three different areas, New York, New Jersey and New England?

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22 A. Yes, I did.  
23 Q. Can we see Slide 8, please.  
24 Explain to the jury what this shows.  
25 A. This shows where the total amount of gasoline that was  
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1 delivered by everyone into New York Harbor went. They're  
2 roughly equal, 40 percent for New York, a little over 30  
3 percent for New Jersey, a little over a quarter for New  
4 England.  
5 Q. With regard to this information, did you use it to  
6 calculate the percentages for RFG attributed to Exxon?  
7 A. Yes, I did -- well, no.  
8 These are a representation to try to help explain  
9 where the demand was. So what this -- the underlying numbers,  
10 the actual total volumes made up the denominator of that  
11 fraction that I was showing you, that is the total amount of  
12 gasoline.  
13 Q. So this illustrates what is on the bottom here?  
14 A. On the bottom here, yes. Sorry, I can't always get this  
15 over the desk. Yes, the bottom there.  
16 Q. What you're then going to do is divide that into the  
17 Exxon/Mobil RFG supply to New York Harbor. Am I correct?  
18 A. That's correct.  
19 Q. That came from what three areas that you identified are  
20 means of shipment?  
21 A. Well, it comes from pipeline shipment, and I looked at all  
22 of the pipelines that come from the Gulf Coast or from the  
23 Mid-Atlantic states in this general area. It is only the  
24 Colonial Pipeline on which Exxon/Mobil product could reach New  
25 York by pipeline.

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1 There are border rights by barge from the Gulf Coast  
2 and from the Mid-Atlantic. There are some imports coming from  
3 refineries in other countries that Exxon or Mobil was  
4 affiliated with.  
5 Q. Did you do a similar calculation for the period prior to  
6 1995 to determine the percentage of Exxon refined or  
7 Mobil-refined gasoline in New York?  
8 A. Yes.  
9 Q. Go to Slide 18, please.  
10 Can you explain to the jury what this fraction of the  
11 calculation is.  
12 A. The idea of the fraction is exactly the same thing, what  
13 was refined or manufactured by Exxon/Mobil that got to New York  
14 on top and the total amount of motor gasoline in this New York  
15 Harbor pool on the bottom.  
16 I had to use different data because there was no such  
17 thing as reformulated gasoline, so I used total motor gasoline.  
18 The good news was that I had slightly better data because of  
19 that on some things.  
20 So New York and New Jersey consumption, I calculated  
21 essentially the same way I did for the earlier period, but  
22 there were some missing years. So I had to make -- so I --  
23 here we go -- so for the New York and New Jersey consumption,  
24 you see they come out to be the same as they were before. For  
25 New York, I'm including these two additional counties which are

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1 counties that consumed conventional gasoline. They're not RFG  
2 counties.

3 So there is a bit of a -- so they would always have  
4 been served from New York Harbor, but they would have not have  
5 been getting reformulated gasoline in the early period. I had  
6 to make this area a little bit bigger here.

7 The 70,000 barrels a day I calculated, the state  
8 stopped -- the state did not -- the state did not provide data  
9 on county-level gasoline consumption this far back. So instead  
10 I used the SEDS data from EIA on state level gasoline  
11 consumption, and for each county I calculated its share of  
12 total state consumption during the period when I did have data  
13 on the county, and then I multiplied the total state  
14 consumption by that in these earlier years to estimate  
15 consumption for most of the 1985 to '91 period.

16 Q. With respect to New Jersey, how did you estimate the demand  
17 in New Jersey for 1985 to 1994?

18 A. For New Jersey I did essentially the same thing. During  
19 this period the stopped record EMT so I took the share of North  
20 Jersey and total New Jersey demand during the period when I did  
21 have data and I multiplied that by the total demand in New  
22 Jersey that came from the SEDS data for the years where it was  
23 missing.

24 So basically I took the -- for both of these, I took  
25 the information that I had about let's call it regional

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1 gasoline consumption and I assumed that the regional share of  
2 the total states stayed the same in the earlier period, but I  
3 did have data on how the states' total consumption was  
4 changing.

5 Q. Now, with regard to this analysis for the period 1985 to  
6 '94, did you take account of shipments on the Buckeye Pipeline  
7 System west into Pennsylvania and Upstate New York?

8 A. Yes. Some of the gasoline that arrived into New York  
9 Harbor actually did get shipped out in this period. The  
10 Buckeye Pipeline goes to Pennsylvania and Upstate New York. It  
11 can carry conventional gasoline, but that's what we're talking  
12 about now, so I had to add this 30 million barrels per year  
13 going out of New York Harbor to get on Buckeye.

14 Q. The deliveries to New England, how did you calculate those  
15 on the basis of thousands of barrels per year?

16 A. That was straightforward. The Army Corps of Engineers did  
17 provide data on shipments out of New York Harbor of total  
18 gasoline. So I simply took all of those shipments and that  
19 gave me my number for New England with one adjustment.

20 Some of the barges loaded here in New York Harbor down  
21 in this area went up to terminals up here in Westchester,  
22 Putnam, maybe Dutchess Counties. Some of them went to Long  
23 Island, so I didn't include that because I would have  
24 double-counted that. I didn't want to include that both in the  
25 shipments out of New York and the consumption in New York.

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1 Q. Did you during the period '85 to '94 prepare a chart  
2 summarizing what percentage of gasoline went in different

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3 directions out of the harbor?

4 A. Yes, I did.

5 Q. Slide 10, please.

6 A. Again, these are the shares. Because it is now total  
7 gasoline, not all of New England had to use reformulated  
8 gasoline, so more of it was going to New England in the earlier  
9 period.

10 Some was going to Pennsylvania and Upstate New York,  
11 so the shares shifted a little bit, but I needed to take into  
12 account all of those in order to have all of the gasoline that  
13 was supplied to New York Harbor by somebody.

14 Q. Now, with respect to demand, that's the bottom of the  
15 calculation, did you also look at sources of supply for  
16 Exxon/Mobil gasoline to calculate how much Exxon/Mobil gasoline  
17 during this time period was making its way to New York Harbor?

18 A. Yes, I did.

19 Q. With respect to your work in this case, did you prepare an  
20 illustration showing the routes for Exxon's reformulated  
21 gasoline to get to New York Harbor?

22 A. Yes, I did.

23 Q. Slide 12, please.

24 Can you explain to the jury what slide 12 illustrates.

25 A. Slide 12 illustrates the four sources of gasoline that

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1 Exxon shipped through into New York Harbor. There is  
2 international, there are FOUR countries in which Exxon or Mobil  
3 was affiliated with a refinery and reported on their EIA data  
4 forms that they had imported gasoline from those countries.  
5 That accounts from there.

6 Q. The 1 MB/Y, what does that mean?

7 A. That is one million barrels per year.

8 Q. That is imported Exxon gasoline?

9 A. Imported gasoline imported into New York Harbor for which  
10 Exxon was the importer. It was Exxon that owned title to the  
11 product when it arrived in New York Harbor and where Exxon had  
12 a refinery in the country of origin.

13 There is an exception to that. In Saudi Arabia there  
14 is a refinery at Yanbu, referred to as SAMR, Saudi Arabian  
15 Mobil Refinery. I had some data that came from Exxon reporting  
16 loadings of ships in Saudi Arabia that were at that point  
17 destined to New York Harbor.

18 So whenever that number was larger than what Exxon  
19 reported as imported to New York Harbor, I took the larger  
20 number, so I was inflating, if you like, Exxon's import. I  
21 generally did this if I had two numbers and one gave me a  
22 bigger number for Exxon, I took the bigger number pretty much  
23 without worry which number was more plausible.

24 Q. 1,000 barrels per year, is that the average for 1995 to  
25 2003?

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1 A. That is the average from 1995 to 2003, that's correct.  
2 Some years were very large, some were small, but --

3 THE COURT: Yes, is that what you were going to say.

4 MR. CHAPMAN: Yes.

5 THE COURT: Millions of barrels?

6 THE WITNESS: Yes. It should be a big M or two M's,  
7 but I didn't quite do that this time.

9A1JCITF

8 BY MR. STACK:  
9 Q. How about the Mid-Atlantic region which you have less than  
10 1 million barrels per year for RFG on average. What does that  
11 entail?  
12 A. The Mid-Atlantic region indicates that one of Exxon's  
13 refineries which is located at Paulsboro, New Jersey reported  
14 occasional shipments by water from the Mid-Atlantic region,  
15 from there to Staten Island, and that is pretty much what we  
16 have there.  
17 Q. Gulf Coast, less than 1 million barrels per year?  
18 A. Again, that is water-borne shipments. They're pretty  
19 straightforward. Exxon/Mobil reported them on their EIA form  
20 817 as going from the Gulf Coast to the New York, Pennsylvania  
21 area. I took all of those shipments as going to New York  
22 Harbor.  
23 Q. With regard to the Colonial Pipeline, what were the  
24 loadings for Exxon/Mobil refineries on average '95 to 2003?  
25 A. Well, the amount that actually reached New York Harbor, by  
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1 my calculations, was about 8 million barrels per year. That is  
2 from their four refineries in Texas and Louisiana.  
3 Q. With respect to the Colonial Pipeline, you indicated that  
4 there were offloading of product. Can you tell the jury where  
5 that product was offloaded and did you prepare a graphic to  
6 illustrate that?  
7 A. Yes, I did.  
8 Q. Slide 13, please.  
9 A. This again is a general schematic just to give a sense of  
10 how this particular pipeline works.  
11 The Exxon refineries basically are where the train  
12 starts. There is Baytown, Beaumont, Baton Rouge and Chalmette.  
13 The big arrows indicate that. There is a lot of product that  
14 goes in from the Gulf Coast, and for Exxon, my memory is that  
15 it was about 30 million barrels per year.  
16 Q. Out of that 30 million, about 8 million made it to New  
17 York?  
18 A. About 8 million made it to New York.  
19 What happened along the way, the other places that  
20 Colonial gets a lot coming in from Plantation in Greensburg,  
21 North Carolina because those two pipelines have an interchange  
22 there, lots of tanks and terminals, and then Colonial gets a  
23 big injection of gasoline in the Philadelphia-Wilmington area.  
24 In total, about a hundred million barrels per year get  
25 shipped on the Colonial Pipeline, so Exxon was about a third of  
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1 that, but most of that hundred million barrels gets delivered  
2 in Mississippi, Birmingham -- Mississippi here, Alabama,  
3 Birmingham, Montgomery, Georgia, Atlanta, South Carolina, big  
4 deliveries in North Carolina because there are pipelines that  
5 go up toward Kentucky down into the Tidewater, Washington area.  
6 It comes off and then gets refilled again, if you  
7 like, up in Philadelphia before it gets on there.  
8 Q. Now, go ahead.  
9 A. So I think about this, it is like getting a cup of coffee,  
10 which I did at lunch. Suppose you have a 10 ounce cup and  
11 first you go and put 3 ounces of milk in it. You fill it up  
12 with 7 ounces of coffee so you have 10 ounces of coffee with

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13 cream. You drink three quarters of it. That is the little  
14 arrows coming off. What you have left is about 25 percent of  
15 what you started off with, and so if you ask how much cream is  
16 left there, well, it's going to be 25 percent of the three  
17 ounces or about three quarters of an ounce.

18 If you multiply by 10, that is exactly what we have  
19 here because about 25 million barrels in total get delivered  
20 from Colonial into New York Harbor. Exxon was about 30 percent  
21 of what went in, and so it's about 8 million barrels or about  
22 30 percent of what comes out because again we're working on the  
23 theory here everything is co-mingled and it is co-mingled in  
24 the pipeline, too.

25 Q. Did you do a similar analysis for the source of Exxon/Mobil  
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9A1JCIT4 Montgomery - direct

1 gasoline to New York Harbor from the period '85 to '94?

2 A. Yes, I did.

3 Q. Slide 15, please.

4 A. I won't repeat myself, but essentially all exactly the same  
5 calculations and pretty much the same data sources were  
6 involved here. The same coffee cup calculation coming up the  
7 Colonial Pipeline except in this period it was more like one of  
8 those restaurants where the waiter keeps coming along and  
9 refilling your cup whether you want him to or not, so it ends  
10 up with less and less cream in it.

11 I split the output of Exxon's Baton Rouge refinery  
12 between Colonial and Plantation. The amount on Plantation got  
13 diluted on Plantation, and then when it came into the Colonial  
14 Pipeline, it got diluted again, a little bit more complicated  
15 calculation there.

16 The other numbers are pretty much the same. They're  
17 quite straightforward. There is a little bit of product being  
18 shipped by pipeline from the Paulsboro refinery that I assume  
19 got to New York. The big difference is the Bayway Refinery.  
20 Up until 1993, Exxon owned the Bayway Refinery in Linden, New  
21 Jersey, and that made a big contribution to the supply and  
22 changed its share quite dramatically from what it was after  
23 Bayway was sold.

24 Q. After Bayway was sold in 1993, who was the refiner of the  
25 gasoline?

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1 A. Tosco was the original purchaser and the refiner. They  
2 were then I believe purchased by Phillips, and they merged with  
3 Conoco Phillips, that succession of the companies where they  
4 were the refiner and manufacturer for that point.

5 Q. After 1993 for your purposes of your calculations to  
6 determine how much Exxon refined gas gasoline was in New York  
7 Harbor, did you count the Bayway Refinery as product that was  
8 being refined by Exxon and Tosco?

9 A. No, I didn't because my intention here was to calculate a  
10 fraction based on who refined and manufactured the gasoline,  
11 not who was selling it in the harbor. You come up with two  
12 very different calculations.

13 Q. For the period 1985 to 1994, did you determine what the  
14 overall percentage was for Exxon and Mobil-refined gasoline  
15 into New York Harbor?

16 A. Yes.

17 Q. Slide 19, please.

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18 A. Taking the shipments for the whole period from all of those  
19 sources and dividing by the deliveries for that whole period  
20 from everyone else, I came up with 14.1 percent as Exxon/Mobil  
21 share.

22 Q. With respect to the period for '95 to 2003, did you also  
23 develop an opinion as to the percentages of supply that went  
24 into New York Harbor of Exxon/Mobil refined product?

25 A. Yes. That is the next slide.

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1 Q. 20, please.

2 A. Yes, that is 5.2 percent again of the product refined and  
3 manufactured by Exxon/Mobil that reached New York Harbor.

4 Q. In your opinion, to a reasonable degree of economic  
5 certainty, what was the percentage on average of Exxon and  
6 Mobil-refined gasoline delivered in New York Harbor for the  
7 period 1995 to 2003?

8 A. 5.2 percent.

9 Q. Go back to 19.

10 During the period from 1985 to 1994, what, in your  
11 opinion, to a reasonable degree of economic certainty, was the  
12 percentage of Exxon and Mobil-refined gasoline delivered in New  
13 York Harbor?

14 A. 14.1 percent.

15 Q. With respect to the work that you did in this case, did you  
16 also look at and determine what retail market share Exxon/Mobil  
17 had in New York?

18 A. Yes.

19 Q. With respect to the retail market share, what was the basis  
20 of your calculation of retail market share for Exxon and Mobil  
21 in New York State?

22 A. I used data on market shares that is produced by the  
23 private company Lundberg surveys. Lundberg is an industry  
24 standard source of data and it was the only one that I know of  
25 that provided comprehensive data for this entire period on

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Montgomery - direct

1 shares not just for Exxon/Mobil, but for all of the other  
2 participants in the market, and my instructions were to develop  
3 an estimate of market shares for the group of refiners whose  
4 brands were being sold in New York Harbor.

5 Q. Does Lundberg provide data for counties on a state-by-state  
6 basis?

7 A. No.

8 Q. What is the lowest geographic area that they provide market  
9 share data for?

10 A. Their market share service only goes down to the state  
11 level.

12 Q. Based on your experience in the industry, what is the basis  
13 for the Lundberg calculation? What do they look at?

14 A. Lundberg looks at data on state tax receipts because they  
15 report shares -- well, essentially they collect data on the  
16 volumes, the total sales by state. They do that for taxable  
17 gasoline, and they collect the data on the total sales from  
18 each of the state's tax departments by collecting data on how  
19 much taxes were paid for how much -- excise tax paid on the  
20 gasoline.

21 They include sales to government because even though  
22 they're not taxable, the refiner actually has to pay the tax to

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23 begin with, so it gets caught in their method of calculating  
24 the sales.  
25 Q. In looking at the Lundberg data, did you analyze every year  
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1 that you did in determining the share of refined gasoline?  
2 A. No, I didn't. The document production in this case  
3 provided me with copies of original Lundberg survey documents  
4 back through I believe it was 1992.  
5 Prior to that we didn't have the data, and since I was  
6 doing this under a very short deadline, we purchased data from  
7 Lundberg for every other year from 1985 to 1991.  
8 It was my judgment -- and was confirmed looking at the  
9 data -- that that would give us a reasonable basis for  
10 estimating the market shares in the intervening years.  
11 Q. What sellers did you identify in the Lundberg survey for  
12 the purposes of your opinions in this case on retail market  
13 share?  
14 A. I identified all of the sellers that Lundberg has been  
15 tracking over this entire period of time. They track about 30  
16 refiners, major marketers and other firms who sell to branded  
17 stations in the New York area. The numbers changed over time  
18 as some of them entered the market, some of them leave the  
19 market, some of them merged with others. So I actually  
20 reported that several different ways.  
21 Q. Did you prepare a graphic showing what the primary  
22 suppliers were based on information you had for the New York  
23 City area in Queens?  
24 A. Yes.  
25 Q. Can you explain to the jury what this bar chart shows.  
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1 A. Yes. What I've done here is take the data that I got from  
2 Lundberg from 1985 to 2003. I actually got their sales data  
3 as well as their share data, so I was able to do the same  
4 proper aggregation over this period by adding up the total  
5 sales attributed by Lundberg to each of these companies and  
6 then dividing it by what Lundberg reported to be the total  
7 sales in all of New York State.  
8 Q. With respect to this, is this going to add up to a hundred?  
9 Is this counting everybody or did it exclude certain  
10 parties?  
11 A. I excluded certain parties.  
12 Q. With regard to the average for Exxon/Mobil during the  
13 period 1985 to 2003, what in your opinion is a reasonable  
14 degree of economic certainty was the retail market share that  
15 Exxon/Mobil had in the State of New York?  
16 A. I believe the best estimate of that is 27.7 percent.  
17 Q. With regard to the Lundberg data, does that allow you to  
18 break out how much was reformulated gasoline?  
19 A. No.  
20 Q. Does it allow you to break out how much the market share  
21 may have been in the County of Queens?  
22 A. No.  
23 Q. With regard to the numbers that we looked at, we're looking  
24 at very different --  
25 THE COURT: May I interrupt?

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1 MR. STACK: Sure, by all means.  
2 THE COURT: You could have done that year by year?  
3 That is the average for 18 years, but you could have done it  
4 year by year by year, right?  
5 THE WITNESS: Yes, your Honor. In the appendix to my  
6 third report, I have the year-by-year data laid out there.  
7 THE COURT: If one looked at only at the '94 through  
8 '03 period, you still wouldn't have RFG only because it is the  
9 whole state?  
10 THE WITNESS: That's correct.  
11 THE COURT: I see. That is why you can't do RFG only?  
12 THE WITNESS: That's correct, yes.  
13 THE COURT: You would know in those years it was more  
14 or less of the same?  
15 THE WITNESS: Yes.  
16 THE COURT: Thank you.  
17 BY MR. STACK:  
18 Q. This is an average based on all of the parties' reporting  
19 for all of the years you looked at from 1985 to 2003. Am I  
20 correct?  
21 A. That's correct.  
22 Q. You indicated some of these people come in and out of the  
23 market?  
24 A. Yes.  
25 Q. When you look at the average for these parties based on the  
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1 number of years that are in the market, do some of the  
2 percentages change?  
3 A. Yes, they do.  
4 Q. Can you look at 24, please. Can you explain to the jury  
5 what 24 A is.  
6 A. What I did in 24 A is I took for some of these -- for  
7 example, El Paso is a good example because it changed a lot.  
8 El Paso was only in the market for maybe a half a dozen years  
9 out of this entire, what, 18 or so year period.  
10 So when I take its -- so if I divide it, so if I take  
11 its sales during 8 years and then divide it by the total amount  
12 of gasoline that was sold into New York Harbor over the entire  
13 18 years, I get a very small number.  
14 So what I did for these calculations was I took for El  
15 Paso its sales just in the years when it actually was operating  
16 in New York and divided that by the total sales just in those  
17 specific years. So they gave me a larger number.  
18 It gave, I thought, a better impression of what the  
19 presence was of El Paso, for example, during the time it was  
20 operating, not diluting that by all of the years when it just  
21 wasn't here at all.  
22 Q. Did you actually prepare a chart that actually shows what  
23 the changes are for by dividing all 18 years versus years in  
24 the market?  
25 A. Yes, I did. I hope I remembered right that El Paso was on  
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1 it. Yes, good. As you can see, for some of the smaller  
2 entries it made a significant difference in the larger presence  
3 they had during the years they were actually in the market.

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4 Q. The green color is market share based on how many years  
5 being divided by?  
6 A. The green color is based on being divided by the full 18  
7 years.  
8 Q. If we divide the market share by the number of years in the  
9 market, that's depicted in what color?  
10 A. That is in the blue color.  
11 Q. With regard to the work that you did in this case, did you  
12 analyze for all these companies what their aggregate was for  
13 years in the market if we reported just on years in the market,  
14 would they report sales?  
15 A. Yes.  
16 Q. 25, please.  
17 A. Go back, yes. That is the one we just looked at, yes.  
18 Q. If we are looking at the numbers of years the company was  
19 actually selling gasoline, percentages would be as set forth  
20 here, Exxon/Mobil doesn't change because why?  
21 A. Because Exxon/Mobil was in the market every year.  
22 Q. With respect to the work that you did in this case, did you  
23 look at the EIA prime supplier data that Mr. Tallett looked at?  
24 A. Yes, I did.  
25 Q. With respect to the EIA data, did you use it for your

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9A1JCIT4 Montgomery - direct

1 opinions in this case?  
2 A. I used it in just really -- in one part of the calculation  
3 which is to determine the share of reformulated gasoline in  
4 total New England consumption.  
5 I needed to use that data in order to split New York  
6 consumption into RFG and non-RFG. That was the only use I made  
7 of it. I didn't make any use of it in calculating the retail  
8 shares. It did provide some interesting insights about some  
9 other things, though.  
10 Q. Why did you not choose to use EIA prime supplier data for  
11 New York and New Jersey?  
12 A. Because EIA itself indicates that the data are not reliable  
13 for New York and New Jersey.  
14 Q. Why not?  
15 A. Because the prime supplier data are reported by the either  
16 refiner or the marketer who sells the product to a local  
17 distribution company. It could be a jobber, it could be a  
18 big -- you know, the owner of a chain of retail stations, but  
19 it is someone who, you know, they think is going to be  
20 distributing the gasoline at retail or selling it itself.  
21 The report is done by the seller, by the refiner who  
22 in this case is sitting back in the Gulf Coast of what they  
23 think is going to happen to the gasoline where they've sold it  
24 and so when the gasoline is sold to a buyer in New Jersey who  
25 they know is a distributor, which means they have to report it

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1 on the 782 (c), and when it is delivered to a terminal in New  
2 Jersey, they tend to say, "New Jersey."  
3 The problem is -- and EIA itself points it out -- that  
4 New Jersey is actually, most of the terminals are in New  
5 Jersey. When the tank trucks go somewhere to pick up the  
6 gasoline to take it somewhere else other than New York Harbor,  
7 like New York State, they have a tendency to pick it up in New  
8 Jersey more often than they do in New York. We can see this in

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9 the data because the EIA data for the prime supplier data  
10 overestimate the consumption in New Jersey by up to 30 percent  
11 in many years compared to the SEDS data which measures the  
12 actual consumption.

13 And the EIA data, remarkably enough, underestimate  
14 consumption in New York by a large amount relative to the SEDS  
15 data. So I do not believe that the EIA 782 (c) data gives  
16 anything resembling an accurate picture of what sales are in  
17 New Jersey, what consumption is in either New Jersey or New  
18 York at the retail level.

19 Q. Did you do anything to try to make certain that the  
20 Lundberg data that you were relying on was accurately  
21 reflecting people's market shares?

22 A. Yes, I did.

23 Q. Tell the jury what did you do.

24 A. Well, I checked the data itself for any anomalies that I  
25 could detect to see whether there was anything strange as I

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Montgomery - direct

1 looked at the data from one year to another.

2 I also checked it against the SEDS data. I performed  
3 the same test for the Lundberg data for New York that I  
4 performed for the 782 (c) data for New York. I found that the  
5 Lundberg data was generally within about 5 percent, very  
6 consistently of the SEDS data for the total state.

7 Therefore, I concluded it was, in fact, capturing  
8 accurately the New York shares, as it would since it was  
9 collecting the data based on -- since the data were based on  
10 tax collections in New York State.

11 Q. Now, with regard to the work you did in this case, did you  
12 calculate for the purposes of refined product what the average  
13 percentage of Exxon/Mobil refined product was in New York  
14 Harbor during the entire period 1985 to 2003?

15 A. Yes, I did.

16 Q. Slide 23, please.

17 Can you tell the jury what this illustrates.

18 A. This is jumping back again.

19 Q. Correct.

20 A. I am not talking about the retail market share in this  
21 case, 27.7 percent. This is going back for the entire period  
22 1985 to 2003 of the gasoline that was refined and manufactured  
23 by Exxon/Mobil, for that 10 percent.

24 Q. With regard to market share, your opinion is that it is as  
25 reflected on slide 25, those percentages reflect the market

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9A1JCIT4

Montgomery - direct

1 share at retail of Exxon and each of the companies reported by  
2 Lundberg?

3 A. Yes, they do.

4 MR. STACK: I have no further questions.

5 THE COURT: Thank you. Mr. Chapman.

6 MR. CHAPMAN: Thank you, your Honor.

7 CROSS EXAMINATION

8 BY MR. CHAPMAN:

9 Q. Good afternoon, sir.

10 A. Good afternoon.

11 Q. Now, you've worked for Charles River Associates as an  
12 economist for 19 years?

13 A. Yes.

9A1JCITF

14 Q. Exxon has been a client of Charles River Associates for the  
15 whole time you've been there, right?  
16 A. Yes, that's probably true. I have not worked for them  
17 myself for that whole time, but I think they probably have been  
18 a client.  
19 Q. But you've personally done significant work for Exxon over  
20 the past five or six years, right?  
21 A. Yes.  
22 Q. You've also done work for four or five other oil companies,  
23 correct?  
24 A. At various times. I am not sure that is true of the last  
25 four to five years.

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9A1JCIT4

Montgomery - cross

1 Q. But while you've been at Charles River Associates?  
2 A. Yes.  
3 Q. You've done work for the American Petroleum Institute,  
4 right?  
5 A. Yes.  
6 Q. Exxon is a member of the American Petroleum Institute?  
7 A. That's correct.  
8 Q. Exxon is paying \$650.00 an hour for your work and testimony  
9 here today, correct?  
10 A. That's correct. That is my standard rate that Charles  
11 River Associates charges all clients.  
12 Q. \$650.00 an hour?  
13 A. Yes.  
14 Q. How much have you charged Exxon for your work in this  
15 matter so far?  
16 A. I think that CRA's total billings, which include a project  
17 team, have been about \$750,000.  
18 Q. Three quarters of a million dollars for your work on this  
19 case?  
20 A. Yes.  
21 Q. How much has Exxon paid Charles River Associates for your  
22 work over the past five to six years?  
23 A. I do not have any -- I have no idea.  
24 Q. You have done significant work for Exxon over the past five  
25 or six years, you're an economist and you have no idea how much

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9A1JCIT4

Montgomery - cross

1 you have been paid over that period of time?  
2 A. I don't add it up over that entire period of time.  
3 Q. Let's try to add it up, sir.  
4 A. Okay.  
5 Q. How much did you get -- how much did Charles River get paid  
6 by Exxon last year?  
7 A. I am telling you my memory is inexact, but in projects that  
8 I had anything to do with, I believe it was several hundred  
9 thousand dollars. My guess would be 200,000 to 300,000.  
10 Q. That was for the significant work you did for them, right?  
11 A. Well, "significant" is your word. That is the work that I  
12 did for them.  
13 Q. No, sir, that was your word, "significant." I asked you  
14 whether you had done significant work, and you said you had.  
15 So \$203,000 plus the 750,000 they paid you, how much  
16 for the year before that?  
17 A. I would say that the work that I've done for Exxon has  
18 ranged probably between \$200,000 a year to \$500,000 a year over

9A1JCITF

19 the past five years. There are probably some years where it  
20 was minimal.  
21 Q. It was minimal even though you did significant work during  
22 that time?

23 MR. STACK: Objection, your Honor.

24 THE COURT: That is a little bit argumentative.

25 You could by now add up and approximate, I think -- or  
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9A1JCIT4 Montgomery - cross

1 I could. For the four years prior to this year at the average  
2 of maybe, I don't know, 250, that is a million and this year  
3 three, three quarters of a million. Maybe all altogether the  
4 five years, 2 million -- did I go too fast?

5 THE WITNESS: You didn't go too fast.

6 THE COURT: You have better math than me.

7 THE WITNESS: Yes, I would say 2 million over the five  
8 or six years.

9 THE COURT: Give or take?

10 THE WITNESS: This case this year and the other years  
11 you talked about, I would say that's probably a reasonable  
12 estimate.

13 As far as "significant" goes, I would also say it is  
14 probably somewhere between 10 and 20 percent of the business  
15 I'm responsible for at most.

16 BY MR. CHAPMAN:

17 Q. At least a couple of million dollars and up to 20 percent  
18 of the work that you do for Exxon, right?

19 A. That would be in a high year, yes.

20 Q. Could you describe the matters that you've worked on for  
21 Exxon over the past five or six years?

22 A. Well, they really haven't been matters. Most of the work I  
23 have done for Exxon -- as I said, I have never testified for  
24 Exxon before -- most of the work I have done for Exxon over the  
25 past five years has been strategy consulting work and business

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9A1JCIT4 Montgomery - cross

1 consulting work and advisory work to the company itself.

2 Q. Well, can you give me an example of the business consulting  
3 work you've done for this couple of million dollars?

4 A. I've made presentations to internal task forces and  
5 planning departments within the company about the kind of  
6 current status and outlook of issues in energy markets and  
7 environmental policy that I work on.

8 Q. Do you have any specifics about what you have advised on?

9 A. Our work for our clients at CRA is covered by very tight  
10 confidentiality agreements. That controls what I am doing for  
11 Exxon. What I have told you is about all I understand I can  
12 disclose about those assignments.

13 MR. CHAPMAN: Your Honor, Exxon is a party.

14 THE COURT: I was expecting an objection. I was  
15 planning to sustain it.

16 The specifics of other consulting that may have  
17 involved confidential information is just not relevant here.  
18 The jury has the idea. He worked a lot for Exxon, billed a lot  
19 for Exxon. What percentage of that do you think was litigation  
20 related? This potential total of 2 million over five years,  
21 how much involved litigation?

22 THE WITNESS: Only this case.

23 THE COURT: Okay.

24 BY MR. CHAPMAN:  
25 Q. Now, sir, the gasoline that you talked about that comes  
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9A1JCIT4 Montgomery - cross  
1 into New York Harbor through the pipelines and which goes into  
2 the storage terminals is co-mingled product, right?  
3 A. That is what I understand has been discussed in this case  
4 and is one of the theories that the jury is considering.  
5 Q. That is not my question, sir.  
6 My question is --  
7 THE COURT: Based on your knowledge and expertise, is  
8 it co-mingled in the pipeline?  
9 THE WITNESS: Sometimes it is and sometimes it isn't.  
10 THE COURT: Okay.  
11 BY MR. CHAPMAN:  
12 Q. Well, when you say sometimes it is and sometimes it isn't,  
13 what do you mean?  
14 MR. STACK: Objection, your Honor. This is beyond the  
15 scope of his expert report.  
16 THE COURT: I will allow it. He talked about  
17 knowledge of this --  
18 THE WITNESS: Let me say for the purposes of doing my  
19 calculation, I assumed that a hundred percent of the gasoline  
20 was co-mingled everywhere.  
21 I am quite sure that is not true because I know that  
22 there are companies that ship gasoline in segregated products.  
23 BP does it because they have a particular formulation that they  
24 like that they want to keep separate. Exxon has done it at  
25 times for particular grades of gasoline and has not done it at  
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9A1JCIT4 Montgomery - cross  
1 times.  
2 I remember perfectly well that Amoco was the only  
3 company that had unleaded gasoline. That kept that strictly  
4 segregated. Some companies have their own tanks in which they  
5 keep their own product.  
6 On the Colonial product there is a tariff. You can  
7 pay extra if you want to keep your product segregated, and it  
8 is cheaper if you let them mix it up with everybody else's.  
9 Sometimes it is, sometimes it isn't.  
10 Q. Sir, you have got a notebook in front of you.  
11 A. Ah-huh.  
12 Q. Would you turn to Tab 2, which is your supplemental report  
13 of March 30th, 2009.  
14 A. Ah-huh.  
15 Q. Turn to Page 5, Paragraph 10. Do you have that in front of  
16 you?  
17 A. Yes.  
18 Q. If you would look at the second sentence that starts with,  
19 "It is well established." Do you see that?  
20 A. Yep.  
21 Q. Would you read that sentence to the jury, please.  
22 A. "It is well established that due to co-mingling -- I am  
23 sorry -- it is well established that due to co-mingling of  
24 shipments in pipelines and storage terminals, it is correct to  
25 treat gasoline in New York Harbor as a mixed combination of  
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9A1JCITF  
9A1JCIT4 Montgomery - cross  
1 gasoline for multiple sources at any point in time."  
2 Q. Those are your words, right?  
3 A. Yes.  
4 Q. Exxon paid you for those words?  
5 MR. STACK: Objection, your Honor.  
6 THE COURT: Sustained as argumentative. He was a  
7 retained expert.  
8 (Continued on next page)  
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9aldcit5 Montgomery - cross  
1 Q. Sir, you said that you performed a market share calculation  
2 for retail sales, correct?  
3 A. Yes.  
4 Q. And you based that calculation primarily on the Lundberg  
5 survey, correct?  
6 A. Yes.  
7 Q. Now, if you would turn to Tab 4 of your notebook, which is  
8 your third supplemental report dated September 28, '09, and if  
9 you would look at the chart, which is Exhibit 1, on page 6, and  
10 tell me when you get there.  
11 THE COURT: I'm sorry, I got lost. Say it again.  
12 Which exhibit? Just tell me again.  
13 MR. CHAPMAN: Tab 4, page 6. The chart is called  
14 Appendix B-Exhibit 1.  
15 THE COURT: Thank you.  
16 A. Yes.  
17 Q. Do you have that in front of you, sir?  
18 A. Yes, I would call it a table.  
19 Q. It is entitled Appendix B-Exhibit 1, right?  
20 A. Yes.  
21 Q. Can we put that up, please.  
22 Now, what this shows is --  
23 THE COURT: Excuse me. Can that be made any larger,  
24 if you can?  
25 Q. Can we go up to the top lines, first, the top few lines.

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9aldcit5 Montgomery - cross  
1 There we go.  
2 This shows historical market share of gasoline sold in  
3 New York by present day companies, right?  
4 A. Yes.

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5 Q. And so the years are on the line, and they go from '86 to  
6 2003, right?  
7 A. Yes.  
8 Q. And so that shows, for example, for 1988, ExxonMobil's  
9 share was 25.4 percent, right?  
10 A. Yes.  
11 Q. And in '91 Exxon's share was 27.4 percent?  
12 A. Yes.  
13 Q. And in '96, it was as much as 29.9 percent?  
14 A. That's correct.  
15 Q. And now if we can continue on there.  
16 So Exxon's share got up above 30 percent for a couple  
17 of years, '98, 2002, right?  
18 A. Yes.  
19 Q. And the average was 27.7 percent?  
20 A. Correct.  
21 Q. And other companies, if you go back over to the left, the  
22 other major companies, Chevron, for example, for some years  
23 3 percent, 3.2 percent, etc., right?  
24 A. Yes.  
25 Q. So based on this, Exxon was clearly the retail leader,

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9a1dcit5

Montgomery - cross

1 right?  
2 THE COURT: Do you want to see the --  
3 THE WITNESS: No, I'm just trying to be sure I  
4 understand your question.  
5 A. No, it doesn't tell us that. It tells us that the  
6 combination of Exxon and Mobil had the largest market share  
7 during that period when you add them together. Actually, Sun,  
8 in most years, had a very substantial market share. And if you  
9 look at Exhibit 2, you will see it is much, much larger than  
10 Exxon's ever was.  
11 Q. OK. Sir, why don't we just see if we can make sense of the  
12 numbers.  
13 Can we go over to the right, Liz, please, the  
14 right-hand column.  
15 Just so -- to keep this very simple: 27.7 percent on  
16 that right-hand column, that's ExxonMobil, right?  
17 A. Yes.  
18 Q. On the chart you prepared?  
19 A. Yes.  
20 Q. And that's the biggest number in that column, right?  
21 A. Well, if you go down further, you will see that the next  
22 biggest number is something you didn't include.  
23 Q. Sir --  
24 THE COURT: That is OK. Excuse me.  
25 What is the next biggest number?

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9a1dcit5

Montgomery - cross

1 THE WITNESS: Sun. And I believe it's 13 --  
2 THE COURT: When you say Sun, do you mean Sunoco?  
3 THE WITNESS: Sunoco, yes.  
4 THE COURT: And what number is it?  
5 THE WITNESS: Let's see. Let me go back here. Sunoco  
6 is 12.1 percent.  
7 THE COURT: You are not saying 12.1 is bigger than 27?  
8 THE WITNESS: No, I am not.  
9 THE COURT: So ExxonMobil together is the biggest,

10 right?

11 THE WITNESS: It is the biggest, yes.

12 THE COURT: It is the biggest, OK. All right.

13 MR. CHAPMAN: All right.

14 BY MR. CHAPMAN:

15 Q. And, sir, in describing the oil -- you can take the chart  
16 down.

17 In describing the supply into New York Harbor, as you  
18 describe it, you assumed that for purposes of your analysis,  
19 once the gasoline manufactured by Exxon entered the pipeline  
20 system, it was commingled with that of other manufacturers,  
21 right?

22 A. Yes.

23 Q. So let me ask you about your methodology. Let's say Exxon  
24 puts 20,000 barrels into the Colonial Pipeline at one point and  
25 it was then commingled. OK?

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9aldcit5

Montgomery - cross

1 A. Yes.

2 Q. And while it was on the pipeline, in the pipeline, Exxon  
3 exchanged 10,000 barrels.

4 A. While it is in the pipeline?

5 Q. While it is in the pipeline.

6 A. OK.

7 Q. And further up the pipeline Exxon purchased 10,000 barrels.

8 How many thousand barrels did you credit Exxon with  
9 when it arrived in New York Harbor? 10,000? 20,000? which  
10 one?

11 A. None of those. That's -- I explained in my calculation, it  
12 was not based on transactions at all. It was based on the  
13 physical volumes that were refined and manufactured by Exxon  
14 and put into the pipeline. And there were basically four  
15 steps. The first is how much did Exxon put into the pipeline.  
16 As I said, over this period, that was roughly 30 million  
17 barrels per year. How much did everyone put into the pipeline  
18 physically? That was 100 million barrels per year. Exxon was  
19 three-tenths of that. How much came out in New York Harbor?  
20 25 million barrels. We know that three-quarters of what was  
21 put on the Colonial didn't get to New York Harbor, and if it's  
22 commingled, that means that three-quarters of what Exxon put  
23 into the pipeline didn't get to New York Harbor.

24 Q. So you didn't take into account the amount of gasoline that  
25 ExxonMobil took title to out of the Colonial Pipeline in New

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9aldcit5

Montgomery - cross

1 York Harbor, is that right?

2 A. Of course not. The purpose of this calculation was to  
3 track how much gasoline was refined and manufactured by  
4 ExxonMobil, and, by definition, if they took title to someone  
5 else's gasoline in New York Harbor, that gasoline was  
6 manufactured by someone else.

7 Q. But it's a commingled product, so you don't know that, do  
8 you?

9 A. Yes, I do. I know perfectly well that if the gasoline was  
10 put into the Colonial pipeline, when it arrived in New York  
11 Harbor it was not commingled with Irving Oil Company's  
12 shipments to New York Harbor that came by ship. The  
13 commingling occurred after it came into New York Harbor. I  
14 calculated the shares as they were going into New York Harbor.

9A1JCITF

15 THE COURT: So you're saying --  
16 Wait. Excuse me.  
17 -- there was no commingling in the pipeline process?  
18 THE WITNESS: There was commingling in the pipeline  
19 but in each pipeline it occurred separately.  
20 THE COURT: So there are two stages to the  
21 commingling; one in the pipeline itself?  
22 THE WITNESS: Yes.  
23 THE COURT: One in the harbor?  
24 THE WITNESS: Yes. Exactly right. So what I'm saying  
25 is the 25 -- sorry, the 8 million barrels of Exxon gasoline  
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9a1dcit5

Montgomery - cross

1 that was its share of the commingled 25 million that came out  
2 of the Colonial Pipeline, that 8 million was then commingled  
3 with the remaining -- I'm sorry, 33 million barrels say that  
4 had come in from other sources so that you had a commingled  
5 total, Exxon is just part of that commingled total. And,  
6 therefore, when we further go to ask, well, you know, what are  
7 the likely shares in Queens, what are the likely shares in  
8 Queens of what was manufactured by different refiners, it is  
9 the same as the shares that they delivered into the pool in New  
10 York Harbor.  
11 It is like, I mean, suppose you have a -- never mind,  
12 you had a bathtub that has four jets going into it. Each one  
13 of those jets may have -- let's make this fancy. Suppose  
14 you're doing a party and you have a jet that has yellow, a jet  
15 that has green, a jet that has blue, going into your tub. You  
16 can tell exactly what color they are when they are going into  
17 the tub. They end up purple. And we're saying that, you know,  
18 in New York Harbor it's purple. But it is not purple when it  
19 comes in; it is entirely separate.  
20 We know that the ship that's carrying Irving Oil's  
21 product down toward Staten Island is not yet commingled with  
22 the 25 percent Exxon product that's in the Colonial Pipeline.  
23 BY MR. CHAPMAN:  
24 Q. Sir, what was the percentage of that purple product which  
25 Exxon took title to in New York Harbor coming out of the  
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9a1dcit5

Montgomery - cross

1 Colonial Pipeline?  
2 A. I have no idea because it is completely irrelevant to my  
3 calculation.  
4 Q. You have no idea.  
5 Now, sir --  
6 A. Actually, could I stop you?  
7 THE COURT: Yes, you can.  
8 Q. Yes, you can.  
9 A. I have a reasonable estimate -- first of all, I was not  
10 asked to give an opinion on that. I haven't looked into it  
11 carefully. But if pushed, I believe there is enough data in my  
12 report that I could come up with the back-of-the-envelope  
13 calculation. Because I do know from the Lundberg data how much  
14 they attributed to Exxon as a sale. So the difference must be  
15 it.  
16 THE COURT: I don't think anybody is asking you right  
17 now to do that.  
18 THE WITNESS: OK.  
19 Q. But your number from Lundberg is 27.7 percent, right.

20 A. Yes.  
 21 Q. OK. Now, sir, you said that you -- you were asked to  
 22 calculate Exxon's market share as a manufacturer from 1985 to  
 23 2003, right?  
 24 MR. STACK: Objection. That mischaracterizes his  
 25 testimony. He was not asked to calculate their market share as  
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9a1dcit5 Montgomery - cross  
 1 a manufacturer.  
 2 THE COURT: I don't know. You mean as a manufacturer  
 3 and refiner; is that your point?  
 4 MR. STACK: Yes, your Honor.  
 5 THE COURT: That is all. That is the only point he is  
 6 making.  
 7 Q. You calculated the market share as a manufacturer and  
 8 refiner, right?  
 9 A. Yes. The fraction that they produced that reached New York  
 10 Harbor as relative to the total in New York Harbor.  
 11 Q. OK. Manufacturer and refiner, right?  
 12 A. Mm-hmm, that's right.  
 13 Q. What is the difference, based on what you did, between a  
 14 manufacturer and a refiner?  
 15 A. They are words that have been used in the court proceedings  
 16 here and I am treating them as synonymous, that is, that  
 17 refining is a manufacturing activity.  
 18 Q. So when you say manufacturer or refiner, there is no  
 19 difference in your mind, right?  
 20 A. I'm not sure what you're getting at. There are many  
 21 differences in my mind. When I use the word refiner and  
 22 manufacturer, I didn't intend any difference.  
 23 THE COURT: Right. In terms of the math and  
 24 calculations that you did, whether the question was posed as  
 25 manufacturer only or manufacturer and refiner would make no  
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9a1dcit5 Montgomery - cross  
 1 difference; it would make no difference for your calculations?  
 2 THE WITNESS: No, it would make no difference because  
 3 what I was calculating was just gasoline.  
 4 THE COURT: It would make no difference?  
 5 THE WITNESS: OK.  
 6 BY MR. CHAPMAN:  
 7 Q. Sir, what is a manufacturer, as you use that term in your  
 8 testimony?  
 9 A. A manufacturer is someone who falls into the SIC codes that  
 10 we call manufacturing, and refining does.  
 11 Q. Could you define that for us?  
 12 A. Yes. The standard industrial classification lists  
 13 industries as being, you know, of different types. There are  
 14 the kind of primary industries that mine metals. There are the  
 15 retail industries, the distribution industries. Manufacturing  
 16 is a category. And the last I remembered, refining was a  
 17 manufacturing industry.  
 18 Q. What is a manufacturer, sir, as you use the term in your  
 19 opinion?  
 20 MR. STACK: Objection, your Honor. I think we are  
 21 getting a little repetitive and argumentative.  
 22 THE COURT: No, I don't think he has gotten the simple  
 23 definition yet that he is looking for. I will allow it.  
 24 A. A manufacturer is someone who essentially takes goods that

9A1JCITF  
25 are -- you know, a manufacturer is someone who produces -- I  
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9a1dcit5 Montgomery - cross  
1 cannot think of a general definition of manufacturer because I  
2 don't at this point know exact -- remember exactly what it is  
3 that the Department of Commerce uses as a criterion. It's  
4 something that's not an extractive industry. It's something  
5 that is not a service industry. It is something that produces  
6 something.  
7 Q. Sir, all I am asking for is the definition that you used in  
8 reaching your opinions that you testified to today about what a  
9 manufacturer is?  
10 MR. STACK: Your Honor, he has indicated manufacturer  
11 is synonymous with refiner.  
12 THE COURT: He has. Is that all you are looking for?  
13 MR. CHAPMAN: Let me test that a little bit.  
14 THE COURT: All right.  
15 BY MR. CHAPMAN:  
16 Q. Let's take Boeing Aircraft, is that an aircraft  
17 manufacturer?  
18 A. Yes, it is.  
19 Q. So if Boeing has another company make wings to its  
20 specifications, Boeing takes those wings, puts it on the plane,  
21 and Boeing is the manufacturer of the airplane, right?  
22 A. That is correct.  
23 Q. So that's a definition that you used here in your  
24 testimony, right?  
25 A. No. The definitions that I used were, first of all, I  
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9a1dcit5 Montgomery - cross  
1 mean, I calculated some numbers. The definition of the  
2 denominator in my shares is simply the total amount of gasoline  
3 consumed out of New York Harbor. So the definition -- so that  
4 is defined based on what it is, motor gasoline, finished motor  
5 gasoline. When I calculated --  
6 THE COURT: OK. I think I kind of see what  
7 Mr. Chapman is trying to say.  
8 Are you trying to say -- let me see if I can re-ask  
9 the question -- that if ExxonMobil contracted with somebody  
10 else to manufacture for it --  
11 MR. CHAPMAN: Right.  
12 THE COURT: -- and then ExxonMobil takes that  
13 manufactured gasoline as its own, because it asked somebody to  
14 manufacture that gasoline for it, did you count that as  
15 ExxonMobil's gasoline?  
16 THE WITNESS: No. I counted the finished motor  
17 gasoline that was produced by ExxonMobil in the refinery.  
18 THE COURT: You excluded that which was manufactured  
19 for ExxonMobil; ExxonMobil asked company X please manufacture  
20 this for me and sell it to me, you did not include that?  
21 THE WITNESS: Yes. But I likewise included all of the  
22 gasoline that ExxonMobil manufactured for someone else.  
23 THE COURT: True, but --  
24 THE WITNESS: And Bayway always was in an excess  
25 position. They were always manufacturing for someone else as  
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9a1dcit5 Montgomery - cross  
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1 well as Exxon.  
 2 THE COURT: Right. But not the other way around. If  
 3 ExxonMobil contracted with somebody else to manufacture for it,  
 4 you did not count that?  
 5 THE WITNESS: I didn't count that. I did count what  
 6 it manufactured for other people.  
 7 THE COURT: OK.  
 8 BY MR. CHAPMAN:  
 9 Q. Sir, let's turn to Tab 3 in your notebook, which is your  
 10 report of August 28, 2009, and I would like you to turn to page  
 11 20 and there is a chart, I believe.  
 12 THE COURT: You said August 28, 2009, right?  
 13 MR. CHAPMAN: August 28, 2009, your Honor, Tab 3.  
 14 THE COURT: And you said page 20?  
 15 MR. CHAPMAN: Page 20.  
 16 THE COURT: OK.  
 17 Q. Do you have that, sir?  
 18 A. Yes, I do.  
 19 Q. Could we have that up on the screen, please.  
 20 This is your opinion of Exxon's percentage into New  
 21 York Harbor as a refiner/manufacturer for '85 to 2003, correct?  
 22 A. Yes. I think these are the same numbers that I showed in  
 23 my first two charts.  
 24 Q. This is from one of your reports, right?  
 25 A. Yes, and from my testimony today.

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9aldcit5 Montgomery - cross  
 1 Q. So from the years, say, '88 to '92, Exxon's market share as  
 2 a manufacturer or refiner is about 22 percent, right?  
 3 A. I can't say that I could do that arithmetic exactly in my  
 4 head, but I'll take it that that's about right.  
 5 Q. That sounds about right?  
 6 A. Yeah.  
 7 Q. OK. During that time period Exxon owned the Bayway  
 8 Refinery, right?  
 9 A. Yes.  
 10 Q. And in 1993 Exxon sold the Bayway Refinery to Tosco, is  
 11 that correct?  
 12 A. Yes.  
 13 Q. And after that sale, you didn't count the Bayway production  
 14 in Exxon's market share, did you?  
 15 A. Of course not. Exxon was not the -- Exxon was not  
 16 physically refining the gasoline. It no longer owned and  
 17 controlled the refinery that it was being refined in.  
 18 Q. So you didn't count it in your calculation, is that right?  
 19 A. Of course not. I think I made that clear in all my  
 20 reports.  
 21 Q. You didn't count it in your calculation?  
 22 MR. STACK: He said that.  
 23 THE COURT: I think he just said that four times.  
 24 BY MR. CHAPMAN:  
 25 Q. All right. Now, did anyone from Exxon show you the supply

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9aldcit5 Montgomery - cross  
 1 contract between Exxon and Tosco dated April 8, 1993,  
 2 concerning the Bayway Refinery?  
 3 A. No. I didn't look at any supply contracts.  
 4 Q. OK. Why don't we turn to Tab 5. That is PL-5572. It is  
 5 in evidence. There has been testimony on it in this case.

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6 MR. STACK: Your Honor, I'm objecting on the  
7 grounds -- three grounds: First, he has indicated he hasn't  
8 looked at it. Second of all, it is not relevant to his opinion  
9 concerning who refined the gasoline. And, thirdly, counsel has  
10 prepared not only these exhibits but other graphic exhibits  
11 which are misleading, confusing --

12 THE COURT: I can't rule on other exhibits which we  
13 are not up to. But the first two grounds of objection are both  
14 overruled. He is allowed to try to impeach him and he has  
15 brought out that he didn't consider that which Exxon contracted  
16 to buy from other manufacturers.

17 So, Mr. Chapman, you can question him about that. I  
18 understand he has not looked at it. He is showing it to him  
19 now. It is in evidence. He is allowed to do that.  
20 Q. Sir, did anyone from Exxon tell you, or did you become  
21 aware that there was a five-year agreement for Tosco to provide  
22 Exxon with 32.9 million barrels of product for delivery in New  
23 York Harbor for the first year of the contract?  
24 A. I can't say that I know the exact numbers, but I was  
25 certainly aware that Exxon was purchasing product from Bayway.

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9a1dcit5 Montgomery - cross

1 It's obvious because that was the only source it could have  
2 used to supply its gasoline stations.  
3 Q. Were you aware that the contract required Tosco to supply  
4 25.6 million barrels to Exxon each year thereafter for delivery  
5 to New York Harbor?

6 A. No. But I would say it strikes me as being a perfectly  
7 standard contract for purchasing -- a perfectly standard  
8 long-term contract for purchasing.

9 Q. OK. And were you aware that the contract required Bayway  
10 to add a corrosion inhibitor specified by Exxon into all grades  
11 of gasoline it produced for Exxon?

12 A. It doesn't surprise me.

13 Q. OK.

14 A. Again, it's common practice in purchasing gasoline from a  
15 different refiner when logistically your refineries are not  
16 appropriately located to serve a market.

17 Q. Were you aware that even though Exxon sold Bayway to Tosco,  
18 Exxon was still obligated to pay all additive system upgrades  
19 at Bayway to comply with all laws and regulations?

20 A. Excuse me?

21 Q. Were you aware that even though Exxon sold Bayway to Tosco,  
22 Exxon was still obligated to pay for all additive system  
23 upgrades at Bayway to comply with all laws and regulations?

24 MR. STACK: Is counsel reading from a document? Can  
25 he produce it?

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9a1dcit5 Montgomery - cross

1 THE COURT: I assume. But the real question is were  
2 you aware of that? If the answer is no, you can say no.

3 THE WITNESS: Actually, I don't understand what you  
4 are talking about.

5 THE COURT: I guess you weren't aware of it. So the  
6 answer must be no.

7 THE WITNESS: I don't understand what you mean by an  
8 additive system.

9 THE COURT: There must be words in the contract. But,  
10 better yet, it is 3:30. So if the jury would like their

11 9A1JCITF  
12 ten-minute recess, we will reconvene at 20 of 4. Thank you.  
13 (Continued on next page)  
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25

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9aldcit5 Montgomery - cross

1 (Jury not present)  
2 THE COURT: Mr. Chapman, during the recess, can you  
3 point Dr. Montgomery to the language you are referring to?  
4 MR. CHAPMAN: I will.  
5 THE COURT: Would you watch that step. You are making  
6 me very nervous.  
7 THE WITNESS: I'm sorry. I always hold on. Thank  
8 you.  
9 THE COURT: As usual, I have a couple of matters that  
10 I have to take up with you during the recess. I'll try to be  
11 very quick so that we do get our so-called bio break.  
12 Be seated. Two quick issues. One has to do with the  
13 res ipsa business.  
14 You know, on further thought about the res ipsa charge  
15 and it has to be the city and which stations of the defense, I  
16 think we should drop the res ipsa charge. I don't think it  
17 adds anything to this case. I think you can argue to the jury  
18 there were sources and there were leaks and you can put two and  
19 two together and you can draw an inference and you will hear  
20 the judge explain what negligence is, but I think it doesn't  
21 add very much. It is confusing. And if you have to start  
22 adding it here and adding it there, and for me to decide who  
23 has control and it is really a fact issue, I think I am going  
24 to leave it out of the charge entirely.  
25 Any objection?

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9aldcit5 Montgomery - cross

1 MR. CHAPMAN: No objection, your Honor.  
2 MR. SACRIPANTI: No objection, your Honor.  
3 THE COURT: Done. Good.  
4 Next. On this offset for preexisting contamination,  
5 which you have in your draft charge, the ground seems to have  
6 shifted to me. The way the charge reads now, and I have to  
7 spend a minute reading it: ExxonMobil contends that the water  
8 in the capture zone in Station 6 is polluted by other  
9 contaminants. ExxonMobil further contends that these other  
10 contaminants also required treatment to make the water fit for  
11 use as a backup supply of water, that the city's planned  
12 treatment facility will treat these other contaminants as well  
13 as MTBE. ExxonMobil finally contends that it can demonstrate  
14 how much it would have cost the city to treat these  
15 contaminants in isolation.

9A1JCITF

16 Then it says, and here is the important part: The  
17 city contends that by the time it intends to use this water, it  
18 will no longer need to treat the water for other contaminants  
19 in order to use the water for backup purposes.

20 Then it asks the jury three questions. It says: If  
21 find that ExxonMobil has shown, by a fair preponderance of the  
22 credible evidence, that, one, the water in the capture zone at  
23 Station 6 is polluted by other contaminants that renders the  
24 water unfit to serve for backup purposes; two, the city's  
25 treatment for MTBE will also treat these other contaminants in

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9aldcit5

Montgomery - cross

1 a manner that is necessary to make the water fit to serve; and,  
2 three, the cost of treating the other contaminants in isolation  
3 can be fairly estimated.

4 Now, my question is that after listening to  
5 Ms. Bell -- it could have been afternoon, it could have been  
6 between 12 and 1 o'clock this afternoon -- I'm not so sure that  
7 the city is making the contentions that are in the charge any  
8 longer or that the jury has to make these findings.

9 It seems now that the city agrees that it must treat  
10 the PCE, that its treatment for MTBE will end up treating the  
11 PCE, and that the cost of treating PCE in isolation can be  
12 estimated, because she did it. The only factual dispute seems  
13 to be how much it would cost.

14 And this charge could be changed to reflect the  
15 testimony now.

16 MR. CHAPMAN: Your Honor, I agree. And may we submit  
17 some new language to your Honor this evening and we'll submit  
18 it to counsel?

19 THE COURT: Yes. Could "this evening" be like before  
20 7?

21 MR. CHAPMAN: It absolutely will be. Right,  
22 Mr. Campins.

23 MR. CAMPINS: Yes, your Honor.

24 THE COURT: OK. Did you want your break?

25 MR. SACRIPANTI: Your Honor, we will get to comment on  
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9aldcit5

Montgomery - cross

1 that, I assume?

2 THE COURT: You can't change the city's contention.  
3 If the city no longer wants to contend --

4 MR. SACRIPANTI: No.

5 THE COURT: You can look at what they submit.

6 MR. SACRIPANTI: Here is why I am at a loss, your  
7 Honor, because my Mr. Campins is not here. That is Mr. Pardo.

8 THE COURT: I know that. All I am trying to say is  
9 that this seems somewhat favorable to you.

10 MR. SACRIPANTI: It is, yes.

11 THE COURT: You can look at what they submit.

12 MR. SACRIPANTI: Thank you.

13 THE COURT: But not for long if you want to sum up  
14 because I need to know what I am going to charge.

15 MR. SACRIPANTI: I just wanted to reserve --

16 THE COURT: Yes.

17 MR. SACRIPANTI: Thank you, your Honor.

18 (Recess)

19 (Continued on next page)

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9aldcit5 Montgomery - cross

1 (Jury present)  
2 THE COURT: OK. Please be seated.  
3 Mr. Chapman.  
4 BY MR. CHAPMAN:  
5 Q. Dr. Montgomery, over the break, were you able to take a  
6 look at PL-5572?  
7 A. Yes, I was.  
8 Q. And are you now able to answer the question I asked you  
9 about the additive system upgrades?  
10 A. Yes. I see what it is. I understand what it is.  
11 And, no, I have not seen this provision.  
12 Q. Now, sir, would you turn to Tab 3, which is your report of  
13 August 28, 2009, and specifically go to page 24. There is a  
14 chart there.  
15 A. Yes.  
16 Q. Now, sir, this is the ExxonMobil percentage of gasoline in  
17 New York Harbor 1985 to 2003, correct?  
18 A. Yes.  
19 Q. And it says on bottom of it -- this is your report -- that  
20 the ExxonMobil average percentage of gasoline from '85 to 2003  
21 is 10.6 percent, right?  
22 A. Yes.  
23 Q. So on the graphic you testified to on direct, you rounded  
24 .6 down to zero, right?  
25 A. Yes, it must have been --

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9aldcit5 Montgomery - cross

1 Q. More proper to have rounded it up?  
2 A. You are right. It was unintentional.  
3 Q. Sir, if you counted the Bayway production for five years  
4 after sale as part of Exxon's manufacturer share, how would  
5 that change the numbers on this chart?  
6 A. It would change them to something different. They would no  
7 longer, in my opinion, be a share of the amount that Exxon had  
8 refined that was delivered to New York Harbor.  
9 Q. OK. I understand that, sir. But the numbers all go up,  
10 wouldn't they?  
11 A. Not necessarily, because if I applied that rule  
12 consistently, I would be subtracting everything that someone  
13 else contracted with Exxon to produce for them.  
14 Q. Maybe you missed my question, sir.  
15 I said, if you added the Bayway production, because  
16 Bayway was obligated to deliver gasoline to Exxon in New York  
17 Harbor, if you added that production to the five years of the  
18 contract, the numbers on your chart would go up, wouldn't they?  
19 THE COURT: Mr. Stack is standing because he didn't  
20 miss your question at all. He understood your question  
21 perfectly, and your answer. He said, no, they wouldn't  
22 necessarily go up because I would have to subtract out that  
23 which Exxon manufactured for somebody else. I would have to no  
24 longer count that as manufactured by Exxon. So he is saying it  
25 would be a plus and a minus.

9aldcit5 Montgomery - cross

1 Q. Well, sir, let me --

2 THE COURT: I'm sorry to translate.

3 THE WITNESS: Thank you.

4 Q. Let me ask you this about your chart.

5 Prior to '92, where you see Exxon with percentages of  
6 23 percent, 22 percent, 16 percent, you were subtracting the  
7 amounts which Exxon sold to others, right?

8 A. No, I was not.

9 Q. You were not.

10 when did you start doing that?

11 A. I never did that, because that was not an appropriate --  
12 neither of those adjustments would be an appropriate thing to  
13 do when I am calculating the share of the amount of gasoline  
14 that Exxon produced in New York Harbor.

15 Q. Well, how much did Exxon produce for others, say, in 1995?

16 A. I don't know. You would need to give me that number along  
17 with the number for what was produced at Bayway after 1995 --  
18 after 1992.

19 THE COURT: At this point, just sitting here, you  
20 don't have any idea if they were a large producer for others or  
21 a small producer for others?

22 THE WITNESS: I do know they were a producer for  
23 others because they had excess product beyond what they needed,  
24 but I don't have a precise number. I think it was in between.  
25 BY THE WITNESS:

9aldcit5 Montgomery - cross

1 Q. So you don't know whether the numbers would go up or down  
2 if you added Bayway and subtracted what Exxon made for others,  
3 right?

4 A. It would be an incorrect thing to do but I don't know which  
5 way it would turn out.

6 Q. Now, sir, in making all of these calculations, based upon  
7 the evidence that was available to you, did you use the Mobil  
8 computer program named PACE-CTR concerning refiners and  
9 manufacturers for the years 1994 to 1999?

10 A. No, I didn't. I was aware of it but it hadn't -- it  
11 provided no useful information.

12 Q. So you looked at the program?

13 A. I am aware, from statements in the documentation, of what  
14 the program was intended to do.

15 Q. But let me ask you: Did you look at the information on  
16 that computer program or not?

17 A. No. I looked at the description of what the information  
18 was, and the description was of something that had nothing to  
19 do with this calculation.

20 Q. Whose description was that?

21 A. It was the -- it was the description in the -- in the  
22 responses to questions. You have it, too.

23 Q. I'm trying to figure out what you said you looked at.  
24 Responses to what questions and responses by who?

25 A. It was responses to rogs, to interrogatories. I would have

9aldcit5 Montgomery - cross

1 to go dig back to find the particular piece of paper. It was a  
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2 long time back, and it was kind of essentially dropped out of  
3 the calculations because all it was showing, if I remember it  
4 correctly, is the amount of gasoline that was delivered and  
5 sold in New York by Mobil, but told nothing about the origin of  
6 that gasoline. It was no better than the 782C responses as far  
7 as determining what the amount of gasoline was that Mobil  
8 refined and produced.

9 Q. But you also looked at the retail figures for ExxonMobil,  
10 right?

11 A. No, not in calculating this. They had nothing to do with  
12 this calculation.

13 Q. I am not talking about this calculation anymore.

14 You gave us a figure of 27.7 percent for ExxonMobil's  
15 retail share, right?

16 A. Yes. Could we take this down, then? It is confusing me.

17 Q. Sure, we could take that down.

18 A. Thank you.

19 Q. Let's go back.

20 Did you use the PACE-CTR program of Mobil's for the  
21 years 1994-1999 in doing your retail calculations?

22 A. No, because I was -- I needed to do a retail calculation  
23 for every year that was not available for every year and for  
24 every company. I could not calculate a share for ExxonMobil  
25 using data that was different and possibly inconsistent with

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9aldcit5

Montgomery - cross

1 the Lundberg data I was using for everyone else. The shares  
2 would be meaningless.

3 Q. Did you use the Exxon computer program named MARS, M-A-R-S,  
4 concerning the movement of gasoline from terminals to gas  
5 stations in Queens for the years 1987 to 2001 to verify your  
6 opinions?

7 A. No, I didn't, because, again, the Lundberg data was  
8 providing the only comprehensive data source for doing that.

9 Q. Well, sir, why don't we take a look at Tab No. 6, page 4,  
10 which is the CMO 4, prepared by Exxon in this case.

11 A. I'm sorry. Where?

12 Q. Tab 6, page 4. Unfortunately, these were not numbered  
13 pages when Exxon prepared it.

14 A. Yes.

15 Q. OK. And it says --

16 I have highlighted some language there. This is from  
17 Exxon.

18 -- "From approximately 1987 to 2001, Exxon used a  
19 database in the ordinary course of business named 'MARS' which  
20 recorded movement of gasoline from terminals to service  
21 stations in the Queens County area."

22 Do you see that?

23 A. Yes, I do. Give me just a chance to look at this and make  
24 sure it is what I think it is.

25 (Pause)

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9aldcit5

Montgomery - cross

1 Yes.

2 Q. First of all, sir, were you given this document to look at?

3 A. It looks --

4 Q. Or are you talking about something else?

5 A. No, I'm trying to look at the document to determine that  
6 this particular section looks familiar but the rest of the

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7 document doesn't. So I'm not sure.  
8 Q. Well, did anyone at Exxon ever tell you that Exxon had a  
9 computer program from '87 to 2001 that it used in the ordinary  
10 course of business to record the movements of gasoline into the  
11 particular geographic area you were looking at?  
12 A. Yes -- well, excuse me. That was not the geographic area I  
13 was looking at. The geographic area I was looking at was what  
14 I described, which is New York Harbor. Because the presumption  
15 that we were starting with, a commingled product theory, and  
16 that the appropriate way to measure market shares of what was  
17 delivered to Queens was to look at market shares in the total  
18 New York Harbor, because essentially Queens was just dipping  
19 out of New York Harbor.  
20 Knowing what one company delivered to Queens would be  
21 of absolutely no use in calculating either of the shares that  
22 I've talked about.  
23 Q. It is your opinion, is it not, that a refiner's share of  
24 gasoline delivered to New York Harbor is the best estimate of  
25 that refiner's share of supply to Queens County, right?

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9aldcit5 Montgomery - cross

1 MR. STACK: Are you talking about retail now or  
2 refiners?  
3 MR. CHAPMAN: I said refiners right in my question.  
4 A. You are taking that completely out of context. That was in  
5 a report when I was describing my methodology for calculating  
6 the share of Exxon's refined product that Exxon had produced at  
7 its refineries and what the share of that was in the total  
8 amount of gasoline that was delivered into New York Harbor.  
9 Q. In your opinion, that was the best estimate of that  
10 refiner's share of supply to Queens County, right?  
11 A. That was -- that was the best estimate of the amount -- you  
12 might go on and read the next sentence.  
13 Q. I just asked you a question, sir.  
14 A. You're taking my words out of context.  
15 THE COURT: Let's not quibble about it. Let's read  
16 the next sentence. "Rachel Taylor" --  
17 THE WITNESS: No. Back in what Mr. Sher is citing,  
18 which is a completely different document.  
19 THE COURT: Oh, Mr. Chapman.  
20 A. Mr. Chapman. I'm sorry. I have been looking at everyone  
21 from the back. So I'm sorry, Mr. Chapman.  
22 MR. CHAPMAN: I take that as a compliment.  
23 Q. Let's look at your March 30, 2009 report, page 5, and that  
24 is --  
25

MR. STACK: Tab 2.  
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9aldcit5 Montgomery - cross

1 Q. Tab 2.  
2 A. OK. Yes. Which part were you quoting? OK.  
3 Right. That was the introductory sentence here. I  
4 said it is well established that due to commingling of  
5 shipments -- that's what I'm saying. If the shipments are  
6 commingled, it's correct to treat gasoline in New York Harbor  
7 as a mixed combination of gasoline from multiple sources at any  
8 point in time. It is the next sentence which applies to the  
9 question you are asking me, which is: "Because Queens County  
10 is supplied from New York Harbor, market shares" -- that is,  
11 the share of the gasoline that is produced by Exxon in the pool

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12 in New York Harbor, the amount of cream that came from an Exxon  
13 refinery in the cup of coffee is going to be the same in that  
14 big cup of coffee as it is in the sip that Queens County takes  
15 from the cup of coffee. That's what I'm saying. That's what  
16 my testimony has been, and that's what the report says.

17 "Because Queens County is supplied from New York  
18 Harbor, market shares of gasoline delivered to Queens County  
19 from New York Harbor will be in the same proportions as the  
20 percentage of any particular refinery's gasoline produced and  
21 delivered to New York Harbor divided by total deliveries to New  
22 York Harbor."

23 That's my definition. That's my statement. And it  
24 only applies to the commingled product of gasoline produced by  
25 ExxonMobil.

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Montgomery - cross

1 Q. Take that down. Let me ask you a prior question, sir.

2 Did you look at the database called MARS that  
3 ExxonMobil identified?

4 A. No, I did not, because it was irrelevant to either this  
5 calculation or to the calculation of market shares in the State  
6 of New York for which information about deliveries to Queens  
7 tells me nothing.

8 Q. Did you even know about MARS when you prepared your report?  
9 A. I believe I did but it didn't matter because it had nothing  
10 to do with what I was measuring.

11 Q. So you didn't take the time to have any of your staff look  
12 at that database to see if the description was actually  
13 accurate, that there might have been information you needed on  
14 it, is that correct?

15 A. I took the sworn statements of the Exxon affidavits as  
16 being correct.

17 Q. Sir, how many people worked with you on your reports at  
18 Charles River Associates?

19 A. Five or six.

20 Q. And you didn't ask any of those five or six people to look  
21 at the MARS database, correct?

22 A. No. We examined other things in great detail when they  
23 were relevant in order to check things, but for an irrelevant  
24 database that I could tell from the description was not going  
25 to contribute to my calculations, I don't believe they looked

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Montgomery - cross

1 at it.

2 Q. But you don't know?

3 A. We looked at a great many things. We looked at PACE-CTR,  
4 which you mentioned before, I know. We looked at the reporting  
5 systems that both Exxon and Mobil had for what they called  
6 their Clean Air Act reporting systems, which told us a lot  
7 about how much they produced in their refineries but nothing  
8 about where it went. And we realized that none of those were  
9 going to help us in calculating these market shares.

10 Q. Well, OK. Now you say you did look at the PACE-CTR?

11 A. Yes.

12 Q. You looked at that even though you knew that was  
13 irrelevant?

14 A. We looked into the database. Someone may well have taken a  
15 check to see what was in it. I'm not aware of that check  
16 because, at best, what it would have told us is what we knew

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17 already from the documents that were describing it from Exxon.  
18 Q. Sir, all I'm trying to understand: Did you look at the  
19 PACE-CTR or not, yes or no?  
20 A. I think I've answered that.  
21 Q. You said no and then you said yes. I know you've answered  
22 it. I'm trying to get to the fact of whether you did or not.  
23 A. I did not look at the database. I examined every database  
24 that appeared to have any relevant information based on the  
25 representations that were made by the Exxon staff who swore to

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Montgomery - cross

1 these affidavits.  
2 Q. Who on the Exxon staff did you talk to about the PACE-CTR?  
3 A. No one. I read what was stated by Ms. -- sorry, where were  
4 you in the CMO?  
5 Q. Tab 6. Tab 6, page 4.  
6 A. I believe it says Rachel Taylor compiled the transactional  
7 information, and I believe this is signed by someone. I had no  
8 reason to question whether the transactional information was  
9 what it was since it's very hard for something that says it is  
10 to be movement of gasoline from terminals to service stations  
11 in the Queens County area to be anything other than that.  
12 Q. In preparing your opinions, who did you speak to on behalf  
13 of Exxon?  
14 A. I can't remember specific Exxon people that I or my team  
15 discussed things with. For the most part, we relied on  
16 documents, and the documents were provided to us by the  
17 attorneys and they were this kind of production that was  
18 distributed to everyone.  
19 Q. Did you speak to any Exxon executives in connection with  
20 preparing your opinions in this matter?  
21 A. No.  
22 Q. So you just spoke to the lawyers and you got documents,  
23 right?  
24 A. Yes.

MR. CHAPMAN: I have no more questions, your Honor.  
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Montgomery - cross

1 THE COURT: OK. Any redirect?  
2 MR. STACK: Just one brief issue.  
3 REDIRECT EXAMINATION  
4 BY MR. STACK:  
5 Q. You indicated, Doctor, that your opinion with respect to  
6 refined gasoline was that Exxon had a 10 percent or so share in  
7 the period of 1985 to 2003, am I correct?  
8 A. Yes.  
9 Q. And can we put up 23.  
10 Counsel indicated that was actually 10.6 percent?  
11 A. Correct.  
12 Q. You were asked a series of questions about purchasing  
13 gasoline and Exxon taking title to gasoline.  
14 Could you tell the jury why, in answering  
15 Mr. Chapman's questions, you said that's not relevant to the  
16 analysis that I did?  
17 A. It's not relevant because it's a common practice; different  
18 companies will exchange, purchase, sell gasoline in order to  
19 get the gasoline to the particular geographic area or even the  
20 particular stations that they contractually serve. And those  
21 stations could be ones that they own or one that independent

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22 dealers own that sell under their brand. There has been a lot  
23 of testimony, which I would corroborate but don't need to bore  
24 you by expanding on, that if you go to an Exxon station or a  
25 Mobil station or a Citgo station, you're very likely getting

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9aldcit5 Montgomery - redirect

1 gasoline that was not refined by them; it contains their  
2 additive package.

3 That's really the difference that we're talking about  
4 here, that under that -- my understanding was that I was  
5 providing you with information that would be helpful to  
6 identify what the share was of gasoline that was produced by  
7 ExxonMobil, that is, ExxonMobil was responsible for producing  
8 the gasoline that had MTBE in it, and how large that share was  
9 relative to the total amount of gasoline that everybody  
10 produced in New York Harbor.

11 I won't speak to why you might want that information  
12 but I just understood it would be helpful to you.

13 And that has nothing to do with the amount of gasoline  
14 that was sold by Exxon in New York Harbor, because we know many  
15 things about that. We know that a large part of it came from  
16 Irving Oil Company in Canada, which had long-term contracts to  
17 supply Exxon. We know that Exxon's gasoline couldn't  
18 physically have gotten to the New York Harbor in undiluted form  
19 in large enough amounts to serve the stations.

20 But that's one of the reasons I think why I was asked  
21 to do the second calculation of its retail market share.  
22 Because the retail market share accounts for all the gasoline  
23 that was sold by ExxonMobil to, you know, to its retail  
24 outlets, to its branded dealers, to even unbranded dealers that  
25 it supplied the gasoline to. But the difference between those

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9aldcit5 Montgomery - redirect

1 two numbers, the difference between 10.6 percent and 27.7  
2 percent is the amount of gasoline that was refined by somebody  
3 else that, as is the common industry practice, Exxon purchased  
4 and delivered to its branded stations.

5 Q. Slide 25 shows us the average of the sales of these  
6 companies in the State of New York for gasoline that they sold  
7 but didn't necessarily make, am I correct?

8 A. That's correct.

9 (Continued on next page)

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9A1JCIT6 Montgomery - redirect

1 Q. When you go back to Slide 23, Slide 23 is your opinion  
2 regarding the percentage of gasoline that Exxon/Mobil actually  
3 made that made its way to New York Harbor and was distributed.

4 Is that correct?

5 A. That's correct.

6 MR. STACK: No further questions, your Honor.

7 RECROSS EXAMINATION

8 BY MR. CHAPMAN:

9 Q. Can we go back to the chart that was just up about for the  
10 years the companies reported sales.

11 A. I think that is it.

12 Q. Now, you said that Exxon/Mobil reported sales for all of  
13 the years, right?

14 A. Well, Exxon or Mobil or Exxon/Mobil as the merged company.

15 Q. Right for all the years. Did those other companies report  
16 them for all the years also?

17 A. No.

18 Q. So you're comparing 27.7 percent to a calculation that is  
19 different for the other companies?

20 A. Yes, that is why I presented both charts. I felt this one  
21 gave a useful perspective how large their presence was when  
22 they were in the market. The other gives a perspective on what  
23 the average was over the entire time period. I wasn't trying  
24 to do anything with it other than provide those two separate  
25 pieces of information.

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9A1JCIT6 WILLIAM DAVID MONTGOMERY

1 Q. So how many years did Cumberland Farms report for, do you  
2 know?

3 A. Yes. Let me go back. I just need to refresh my memory and  
4 make sure I can read.

5 Cumberland Farms reported in -- it appears they  
6 started reporting in 1997 through 2003. Obviously, they're  
7 still around.

8 Q. So that excluded 14 years when Exxon was reporting, right?

9 A. Actually, no. I am sorry. I take it back. Cumberland  
10 Farms, the current Cumberland Farms entity reported in every  
11 year. There was a merger with Gulf so some years it was  
12 Cumberland Farms, some years it was Gulf Cumberland, those two  
13 names, the same company.

14 A. You can see which companies had a difference, which  
15 companies did not report in every year by looking at the other  
16 slide which listed them.

17 Q. Can you look at No. 21, I think it is.

18 A. Try it the other way.

19 Q. Did those companies all report all those years?

20 A. No.

21 Q. How do we know which companies reported all the years by  
22 looking at your charts?

23 A. We need to look at a different chart. We need to look at  
24 the chart that has two columns for each of the companies. It's  
25 there. We talked about it during my direct. That's it.

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9A1JCIT6 WILLIAM DAVID MONTGOMERY

1 Q. I see.

2 A. Everyone other than these companies reported in every year.

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3 Q. These companies did not report every year?

4 A. That's correct.

5 Q. Do you have a chart that shows every company that reported  
6 every year so they can be compared to Exxon?

7 A. Every company that reported every year?

8 That is in Exhibit 1 and Exhibit 2 of my report.

9 There are several companies that are not included in these  
10 charts, this chart because of they were not settling parties,  
11 and so I was asked to take them off. There is a data in the  
12 other chart that is not here but it is all -- we can put it up  
13 on the screen.

14 MR. CHAPMAN: No more questions.

15 MR. STACK: Nothing further.

16 THE COURT: This time I won't forget. The timing is  
17 perfect. Could the jury gather inside whether they have some  
18 questions for this expert.

19 (Jury excused)

20 THE WITNESS: Sorry, your Honor, I didn't want to take  
21 the chance tumbling down the step again.

22 THE COURT: Good, good. Okay. Yes?

23 MR. CHAPMAN: Your Honor, I believe that was Exxon's  
24 last witness. We don't intend to call another witness. Do we  
25 have a couple of pieces of evidence to move in, but then I

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WILLIAM DAVID MONTGOMERY

1 think we rest for the -- I haven't spoken to Mr. Stack.

2 MR. STACK: We have nothing to move in at this time,  
3 your Honor. I believe we have everything in the record that we  
4 need. I'll confer with Mr. Sacripanti and he will tell me  
5 whether I am wrong.

6 THE COURT: What are you moving in?

7 MR. CHAPMAN: I believe we've got some excerpts of  
8 interrogatory answers that have been referred to by Mr. Burke,  
9 and we have excerpted them with the question and answer for  
10 verification.

11 THE COURT: Have you shown them with the defense?

12 MR. STACK: We were provided them with this afternoon.  
13 We have not looked at them. We previously objected to another  
14 version offered. We attempted to reach a stipulation on some  
15 of the points. I have not had a chance to look at them. I can  
16 take a moment here to look at them, your Honor.

17 THE COURT: Yes, we'll stay after the jury stays, sit  
18 in the back, do it and we'll reconvene and close the record.

19 MR. STACK: Fine, your Honor.

20 THE COURT: So at 9:00 o'clock tomorrow morning we  
21 will begin defense summation?

22 MR. STACK: Correct, your Honor.

23 MR. CHAPMAN: Yes, your Honor.

24 MR. SACRIPANTI: Two hours, your Honor, is that the  
25 allocated time?

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WILLIAM DAVID MONTGOMERY

1 THE COURT: I don't recall.

2 MR. CHAPMAN: An hour and a half to two hours was my  
3 recollection.

4 THE COURT: If that is what I said, then up to that.

5 What about the burden of proof? What did we decide to  
6 do with that? There was a request for rebuttal and I said no,  
7 and I said with respect to the small issue or two issues.

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9 to come back to New York.  
10 THE COURT: Okay. Did you -- sorry?  
11 A JUROR: We are talking about the 30.2 piece. It is  
12 obviously the other one. The other one is 30.2, what  
13 percentage of that?  
14 THE WITNESS: That is all consumed in New York, in the  
15 counties right around New York City. It goes up below Albany  
16 and it is just one or two counties west from here.  
17 THE COURT: Okay. Did you take into consideration  
18 sales of unbranded, that is, mom and pop type gas stations?  
19 THE WITNESS: Yes, and I would say that is true for  
20 both of the calculations that I did. They're included in the  
21 gasoline that is refined by Exxon and delivered in New York  
22 Harbor. It doesn't matter who that goes to. That would be  
23 included.  
24 My understanding of the Lundberg data is that if a  
25 major company like Exxon was included in their data was also  
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1 making sales to unbranded outlets, they included that as Exxon  
2 sales as well.  
3 THE COURT: Finally, did you assume that the gas that  
4 Exxon produced for someone else ended up in New York Harbor?  
5 THE WITNESS: Yes. It wouldn't make any difference.  
6 The way I was doing the calculation, if Exxon produced the  
7 gasoline in Bayway, I assume it all was going to be in New York  
8 Harbor whether they produced it for themselves or someone else.  
9 If Exxon produced the gasoline in the Gulf Coast, then  
10 I assumed that all of that gasoline, no matter who it was  
11 produced for, went into the pipeline, got co-mingled and the  
12 share of it that made its way to New York came out. So, yes, I  
13 included production that they did, they sold to someone else in  
14 everything.  
15 THE COURT: The jurors asked one other question I am  
16 not going to ask the witness about because I hope that will be  
17 answered in my charge, that is where you asked about the  
18 purpose of analyzing supply market share, retail share, is one  
19 more accurate or relevant. Hopefully my charge will answer  
20 that question rather than the witness. I will explain the  
21 different uses of those two different markets.  
22 Okay. I understand one of the defense is resting?  
23 MR. STACK: The defense rests.  
24 THE COURT: The plaintiff is resting subject to your  
25 working out exhibits with the defense?  
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1 MR. CHAPMAN: Correct.  
2 MR. STACK: Correct.  
3 THE COURT: There are no further witnesses at this  
4 time and so as promised, tomorrow at 9:00 we begin summations,  
5 and I think they'll end tomorrow, too, with good luck. We'll  
6 start and finish all summations tomorrow and have the charge on  
7 Wednesday. Please don't discuss the case with each other or  
8 with anyone else. Leave your materials. See you tomorrow.  
9 Hopefully have a good evening.  
10 (Jury excused)  
11 THE COURT: Thank you.  
12 (Witness excused)  
13 THE COURT: Do you want to pick up some notebooks?